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Copyright Royalty Board

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

WRITTEN REBUTTAL STATEMENT OF SOUNDEXCHANGE, INC.

Volume 3: SoundExchange and Artist Fact Witness Statements

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February 23, 2015 **PUBLIC VERSION**

Table of Contents
for the Written Rebuttal Statement of SoundExchange, Inc.
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WRITTEN REBUTTAL TESTIMONY OF

MICHAEL J. HUPPE

President & CEO,
SoundExchange, Inc.

Witness for SoundExchange, Inc.

BACKGROUND

1. My name is Michael Huppe. I am President and CEO of SoundExchange, Inc. ("SoundExchange"). I submitted written testimony in the direct phase of this proceeding that provided information about my professional background and SoundExchange as an organization.

2. Here, I address two very specific topics: (a) SoundExchange's 2009 agreement with the National Association of Broadcasters ("NAB") and (b) SoundExchange's 2009 agreement with Sirius XM, Inc. ("Sirius XM"). In 2009, I was Executive Vice President and General Counsel of SoundExchange and was directly involved in the negotiation of these agreements.

3. I have reviewed the written direct testimony of NAB witness Steven Newberry ("Newberry WDT") and Sirius XM witness David Frear ("Frear WDT"). While I respect and appreciate their efforts to help reach these agreements, I take issue with many of the things they say about the agreements, and have a significantly different perspective of the circumstances surrounding those agreements. I submit this testimony to provide the Judges with the appropriate and accurate context concerning those agreements and, in turn, respond to some of Mr. Newberry's and Mr. Frear's comments about the same.

4. At the outset, I want to note that I take the confidentiality of settlement discussions, including those related to these two agreements, very seriously. Preserving confidentiality is something parties should do, something we expect, and something our counterparties expect that we will do. This type of approach is critical to encouraging such discussions in the future. If a copyright user cannot trust that we will keep confidential their settlement communications, or vice versa, that may well impact whether and how they are willing to have those communications with us. I am surprised and disappointed that the NAB

did not respect the confidentiality of our settlement discussions. Because I believe it is highly inappropriate to disclose the details of private settlement discussions, I will not follow suit; instead, I will respect the confidentiality of the exchanges that led to these settlement agreements. I do not believe it takes confidential settlement communications to show that the positions taken by NAB about our settlement agreements are unfounded.

5. Consequently, my testimony will not address what the representatives from NAB or Sirius told me or other representatives of SoundExchange during their respective confidential settlement talks. Rather, my testimony will respond to Mr. Newberry and Mr. Frear by providing the Judges with facts surrounding the context of those agreements.

6. I will make one important observation at the outset that regards both of these agreements. In both instances, there was significant uncertainty on both sides of the negotiating table about what would happen in the *Webcasting III* proceeding if no settlement was reached. At the time of these two settlement agreements, the parties were preparing for the proceeding and no one – not SoundExchange, NAB, Sirius XM or any other party – had yet submitted a rate proposal, or a direct case, or a shred of evidence before the Judges.

7. No one was able at that time to predict what would happen in the *Webcasting III* proceeding, much less what rates the Judges would decide upon. Indeed, this was only the second webcasting proceeding before the Copyright Royalty Board. Each party bore the risk that the Judges would adopt rates that differed significantly from the rates the party proposed. In fact, the rates ultimately adopted by the Judges, and confirmed on remand, differed from SoundExchange's initial rate proposal, attached hereto as Exhibit 1. That alone is noteworthy because Mr. Newberry and Mr. Frear suggest the Judges' outcome was a foregone conclusion at the time these agreements were negotiated. That is just not true. While SoundExchange trusted

(and trusts) the Judges to faithfully apply the evidence and legal standards, and while we had confidence in the strength of our legal position, the rate-setting process had not yet even begun, and there was uncertainty for all sides such that no party – SoundExchange, NAB, or Sirius XM – could act as if the Judges had already set the rates for the 2011-2015 period.

SoundExchange-NAB 2009 Agreement

8. Steven Newberry stated in his testimony that the rates set by the CRB for 2006 through 2010 necessarily formed the baseline of our discussions with NAB. (Newberry WDT, at ¶ 20.) In one respect, I agree with him. Our agreement with NAB covered the years 2009 through 2015 and so it overlapped with some years where rates were already set by the Judges for the statutory license. Of course, when parties are negotiating an agreement for the same rights that are available under an existing statutory license – as we were – it only makes sense that the discussions are going to be influenced by the rates currently available under the statutory license. That can hardly be a surprise to anyone. In fact, it would make little sense for either party to entirely ignore what NAB members would otherwise pay for the use of our music in 2009 or 2010.

9. That does not mean, however, that NAB "entered the negotiations with no leverage" or, as Mr. Newberry suggests, that SoundExchange knew that NAB had no leverage. (Newberry WDT, at ¶ 20.) If that were true, then there would be no reason to agree to a *lower* rate in the first two years of the agreement than NAB members would have paid under the statutory license. But we did. Under our agreement, NAB members could elect to pay $0.0015 per play in 2009, instead of the *Webcasting II* rates of $.0018 per play, and elect to pay $0.0016 per play in 2010, instead of the *Webcasting II* rates of $.0019 per play. (NAB-SoundExchange

Agreement,[1] at § 4.2 (Exhibit 2).) Also, if NAB had no leverage at all, then one might expect that we would not have agreed to a *lower* rate in 2011 than the *Webcasting II* rate provided for 2010. This was not something that escaped NAB's notice. In their press release announcing our agreement, NAB specifically noted that rates were "reduced in 2009 and 2010 by approximately 16 percent, then gradually increase through 2015 . . ."[2]

10. The NAB had a very different take on the settlement in 2009 than Mr. Newberry does five years later. At the time we reached this agreement and submitted it to the Judges, NAB filed a *joint* statement with us in which we both told the Judges that our agreement had "already been embraced by over 380 commercial broadcasters comprising thousands of individual stations" and the agreement "manifestly provides a reasonable basis for setting statutory terms and rates." (Joint Motion to Adopt Partial Settlement, June 1, 2009 (Exhibit 3).) And, when we announced the actual agreement, NAB's Executive Vice President, Dennis Wharton, said that our agreement "ensur[ed] the continued viability of Internet streaming for America's radio stations . . ."[3] It is hard to reconcile NAB's representation to the Judges and public statements at the time of the actual settlement with the fundamentally inconsistent testimony of Mr. Newberry more than five years later. Indeed, Mr. Newberry's assertion that he did not understand the precedential value of the agreement is preposterous. (Newberry WDT, at ¶ 30.) Whether or not the agreement was precedential under the WSA, Mr. Newberry and the NAB offered it to the

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[1] Notice of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293 (March 3, 2009).

[2] NAB Press Release, February 16, 2009, *available at http://www.nab.org/documents/newsroom/pressRelease.asp?id=1733*

[3] *Id.*

Copyright Royalty Board as the basis to establish rates and terms for a whole category of licensees.

11. It is just as hard to reconcile the actions of broadcasters over the last five years with his testimony. Under the NAB settlement, broadcasters must *elect* to pay the rates identified in our settlement in order to take advantage of the rates the NAB negotiated. As my colleague, Jonathan Bender, testified in the direct phase of this proceeding, there were 678 licensees who elected to pay under the NAB settlement in 2011, which jumped to 851 licensees in 2012 and 949 licensees in 2013. (Bender WDT, at 13 (Figure 2).) The license category related to the NAB agreement rates is one of the largest areas of growth in statutory webcasting, both in terms of absolute number of licensees and relative percentage increase in licensees. Licensees operating under the NAB settlement make up, by far, the largest category of statutory licensees–more than half of all commercial webcasters. And, notably, that growth has occurred in 2011 through 2013–the years that are contemporaneous with the *Webcasting III* rate period, years where the rates escalate in the NAB settlement, and years *after* NAB received its discount off the *Webcasting II* rates.

12. As Mr. Newberry is one of the leading figures at the NAB, I would have expected him to speak out loudly and forcefully over the years before so many of his fellow broadcasters–including so many new broadcasters–signed onto the agreement. It seems odd that now, years after scores of NAB members have elected to utilize the rates that we negotiated with NAB, and when the agreement is about to expire, that Mr. Newberry is criticizing the agreement and claiming the rates are unacceptable as a result of NAB being forced into the deal.

13. Mr. Newberry suggests that our agreement "was really a take-it-or-leave-it result between a monopoly seller that held all of the cards and a buyer that had no viable alternatives."

(Newberry WDT, at ¶ 3.) In fact, I understand that based upon Mr. Newberry's characterization of our negotiations, an economist retained by NAB has also accused SoundExchange of acting as a monopolist in negotiating this agreement. That characterization does not match up with the facts.

14. NAB had (and has) options to negotiating with SoundExchange. First, NAB or its members could have chosen to fully participate in the *Web III* proceeding before the Judges. Strangely, Mr. Newberry claims that "NAB did not consider litigation over rates for the 2011 to 2015 period to be a meaningful option. The proceeding had already begun by the time that we began our discussions with SoundExchange." (Newberry WDT, at ¶ 22.) While it is true that the proceeding had just begun, NAB had in fact retained legal counsel and filed a petition *to participate* in the *Webcasting III* proceeding. (NAB Petition to Participate, February 4, 2009 (Exhibit 4).) NAB had clearly preserved its option to litigate as an alternative to negotiation, and hired counsel to pursue that route if necessary.

15. Mr. Newberry repeatedly implies that the broadcasters would not be treated fairly by the Judges at the Copyright Royalty Board. He says, among other things, that the NAB lacked "any reason" to "believe that another litigation would lead to a better result from the same Judges." (Newberry WDT, at ¶ 3.) He states that "we did not view the CRB as a forum that was likely to adopt reasonable license fees for broadcasters or webcasters in the next proceeding," and "we did not expect the same Judges to be more favorably disposed to broadcasters in a proceeding in 2009-2010 than they were in the proceeding in 2006-2007." (Newberry WDT, at ¶ 22.) I take issue with Mr. Newberry's not-so-subtle suggestion that the Judges at the CRB were biased against broadcasters. Our experience, including in instances when we have not received

the outcome we hoped for, are that the Judges at the CRB do their best to faithfully apply the law based on the evidence presented to them.

16. Second, as another alternative to negotiation with SoundExchange, the NAB could also have chosen to avoid engagement altogether: Many statutory licensees don't actually participate in the proceedings, even if they intend to rely on the statutory license once the rates are set.

17. Third, if NAB was concerned about the leverage of SoundExchange, NAB could have elected to negotiate directly with copyright owners for the use of their sound recordings. Mr. Newberry himself notes that the NAB "negotiated a series of waivers of the statutory license conditions" directly with record companies that "were an important part of the overall package and had significant value to us." (Newberry WDT, at ¶ 28.) If NAB was able to negotiate those waivers, surely it could have explored the possibility of negotiating direct licenses if it was so concerned about SoundExchange's leverage at the time. And, in fact, NAB was free to negotiate direct licenses with copyright owners *after* 2009 as an alternative to its purportedly one-sided bargain with SoundExchange.

18. Finally, NAB's members had the option to walk away from Internet streaming altogether – an option that is unavailable to SoundExchange and its members. Broadcasters, and all webcasting licensees, always have the opportunity to choose not to perform sound recordings. In the course of his testimony, Mr. Newberry states that "[m]usic is just part of what we offer," and that "[o]nly a very small percentage of our audience listens over the Internet." (Newberry WDT, at ¶¶ 11, 14.) He asserts that "we could not convince our local advertisers that distant listeners [reached by streaming] offered them any value," and oftentimes, that no one is even listening to streams by broadcasters. (Newberry WDT, at ¶¶ 15, 31.) If that is so, and if NAB

felt that the agreement it reached with SoundExchange was, or was destined to be, so "one-sided," NAB and/or its members did not need to accept an agreement or participate at all. Instead of running away, however, NAB members elected to participate in the rates set by the NAB and SoundExchange agreement in droves, both in 2009 and in later years.

19. SoundExchange and its constituencies do not have that same choice. It's important to remember that the record companies and recording artists we represent completely lack the power to refuse the use of their music, and are obliged to permit any eligible service to use their sound recordings because the services can always go to the Copyright Royalty Board and use the statutory license. By contrast, the NAB represents broadcasters who have the discretion to utilize (or not) those sound recordings, at the timing they choose, with a myriad of different business models.

20. In discussing leverage, it is also worth noting the relative characteristics of the two organizations that Mr. Newberry is comparing. The NAB represents the interests of the over 15,000 broadcasters (including most of the largest broadcast groups in the country) that, by its own estimate, generate upwards of $17.4 billion a year in the United States alone.[4] SoundExchange is a nonprofit organization with a limited mission representing the interests of creators who are subject to a statutory license, operating in a recording industry whose combined revenue is a fraction of the broadcasting industry.

21. In sum, I reject Mr. Newberry's suggestion that the agreement between NAB and SoundExchange was the result of one-sided leverage. While SoundExchange serves copyright

[4] NAB Annual Report, at 19, *available at* http://www.nab.org/documents/about/2014_NAB_Annual_Report.pdf; NAB "Frequently Asked Questions About Broadcasting", *available at* http://www.nab.org/documents/resources/broadcastFAQ.asp

owners and artists—all of whom have no ability to withhold their music from a service operating under the statutory licensee, the services—including the NAB, a trade association representing virtually the entire broadcast radio industry, and its members—always have several options that bypass agreements with SoundExchange altogether.

SoundExchange-Sirius XM 2009 Agreement

22. Mr. Frear also attacks the 2009 Agreement that his company, Sirius XM, previously agreed to with SoundExchange. Mr. Frear noted three reasons why he now believes that agreement does not reflect a willing buyer/willing seller agreement: (a) Sirius XM was suffering financial hardship; (b) Sirius XM's webcasting service is small or ancillary to their overall business; and (c) the parties, namely SoundExchange, were aware of the regulatory backdrop of the Judges. (Frear WDT, at ¶ 37.) I will address each in turn.

23. Mr. Frear's discussion of how Sirius XM's financial condition impacted these negotiations is not consistent with his own statements in 2009. At the time of our agreement, Mr. Frear reported to investors that Sirius XM had positive adjusted EBITDA for three straight quarters, its revenues were up $7 million, its contribution margin was up by $20 million, and so forth.[5] Also, in the same month that the agreement was announced, Sirius XM began imposing a "Music Royalty Fee" to pass-through royalty costs to their customers, which should have lowered Sirius XM's costs and increased their margins.[6] These events call into question how

[5] Sirius XM Radio Q2 2009 Earnings Call Transcript, May 7, 2009, *available at* http://seekingalpha.com/article/154293-sirius-xm-radio-q2-2009-earnings-call-transcript?part=single

[6] John Paczkowski, *Fee Increase Coming for Sirius XM Subscribers*, All Things Digital. June 5, 2009, *available at* http://allthingsd.com/20090605/fee-increase-coming-for-sirius-xm-subscribers-internal-doc/

dire the financial circumstances were at Sirius XM and whether royalties, particularly webcasting royalties, had any significant impact on Sirius XM in 2009.

24. Mr. Frear also suggests that Sirius XM could not afford to—or rather chose not to—bear the costs of litigating *Webcasting III*. But Sirius XM could have done so. For instance, Mr. Frear notes that Sirius and XM spent a combined $150 million on their merger. (Frear WDT, at ¶ 46.) To put that in context, SoundExchange distributed total *royalties* from all licensees in 2009 of only $155.5 million.[7] Stated differently, at the time of the agreement in question, Sirius and XM were spending roughly the same amount on *one* regulatory proceeding as the *cumulative royalty payments* that *all* artists and record labels received from SoundExchange for the *entire* year.

25. Mr. Frear also notes that SoundExchange "funds rate litigation expenses out of the royalty payments it collects, so the costs of litigation are spread widely among it[s] thousands of members." (Frear WDT, at ¶ 47.) Setting aside his suggestion that the *tens of thousands* of copyright owners and artists have no sensitivity to litigation expenses—or that SoundExchange, a nonprofit organization, has a luxurious litigation budget as compared to Sirius XM—it bears noting that Sirius XM funds its litigation expenses out of the revenue it derives from its 27.3 *million* subscribers.[8]

26. Whether or not Sirius XM faced significant financial hardship or lacked an appetite for litigation, the statutory license must account for a wide variety of services, some large, some small, some in good financial condition, some not so much. Moreover, as I

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[7] SoundExchange 2009 Annual Report, *available at* http://www.soundexchange.com/wp-content/uploads/2013/04/2009-Annual-Report-03-30-11.pdf

[8] That number is as of February 2015. Sirius XM Corporate Overview, *at* https://www.siriusxm.com/corporate.

discussed earlier in this testimony with respect to NAB, any service, including Sirius XM, has a host of options besides negotiating an agreement with SoundExchange. This includes waiting to see what the Judges decide—not litigating *and* not negotiating an agreement—a costless short-term option. Given the supposed ancillary nature of webcasting to Sirius XM's overall business model, such a "wait-and-see" approach might be perfectly justified. Indeed, as I noted above, there are many, many licensees who never participate in a proceeding.

27. And, the option to negotiate direct licenses with any and all copyright owners is *always* an alternative to fully participating in a Copyright Royalty Board proceeding. So is shutting down a webcasting service altogether if the costs of operating a small, ancillary revenue stream are too great for operating a business at that time. Put another way, if Sirius XM was in dire straits, it had several other options short of making an agreement with SoundExchange. Of course, Sirius XM did not choose any of these paths; it voluntarily agreed to rates that it has willingly paid ever since.

28. Mr. Frear's real complaint with the agreement appears to be that "[i]f no agreement was reached, Sirius XM would be stuck with the rates set in *Web II*." (Frear WDT, at ¶ 50.) As an initial matter, Mr. Frear is wrong when he claims that the Judges set a rate of ".18 cents for the first year of the *Web II* rate period, with further increases each year of that period." (Frear WDT, at ¶ 34.) The *Webcasting II* rates started at .08 cents in 2006 and *ended* at .19 cents in 2010.[9] But, also, that is not a criticism of the agreement's *Webcasting III* rates. And, of course, parties negotiating for a service offering that is otherwise eligible for existing statutory rates will consider the existing rates in negotiating the deal. That is not a basis to disregard the value of our agreement.

[9] 72 Fed. Reg. 24084, at 24096 (May 1, 2007).

29. Mr. Frear is simply wrong to conclude that based upon these points, SoundExchange "exercised the market power of a collective representing the entire industry" and precluded any competition among rights owners. (Frear WDT, at ¶ 50.) First, services are always free to negotiate directly with record companies. Second, it would not make sense that SoundExchange would permit a *discount* of existing rates in this agreement if SoundExchange had the sort of power and leverage Mr. Frear suggests. (Sirius XM-SoundExchange Agreement,[10] at § 4.2 (Exhibit 5).) Here, Sirius XM received lower rates in 2009 and 2010 than the *Webcasting II* rates for the same years and got a lower rate in the final year of the rate term than the NAB agreement. Lastly, Mr. Frear suggests that SoundExchange would not have agreed to lower rates with Sirius XM, even if it were economically rational, because "such an outcome could have harmed SoundExchange's ability to use the NAB WSA Agreement rates as benchmarks in future rate proceedings such as this one." (Frear WDT, at ¶ 50.) But under the provisions of the WSA, *both* parties had to agree to designate the rates as precedential. Otherwise, the rates would be non-precedential, and could not be used in this or any other proceeding. As is apparent, Sirius XM and SoundExchange each agreed that the settlement rates could be used as precedent, and Mr. Frear is now simply trying to back away from what he agreed to in 2009.

30. In sum, both Mr. Newberry and Mr. Frear inaccurately portray the context of SoundExchange's agreements with NAB and Sirius XM. Neither NAB nor Sirius XM disavowed these agreements at the time they were signed. Indeed, they or their members flocked to take advantage of the newly negotiated rates. Nor did NAB or Sirius XM disavow the

[10] Notice of Agreements Under the Webcaster Settlement Act of 2009, 74 Fed. Reg. 40614 (August 12, 2009).

agreements for years in which they and their members elected to pay under these settlements rather than express any objection. It is only now, years later and in the context of a rate proceeding, that they are claiming that SoundExchange acted like a monopolist. Given the facts surrounding these agreements, those claims are unsupportable.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: February 22, 2015

Michael Huppe

Exhibits Sponsored By Michael Huppe

Exhibit No.	Sponsored By	Description
SX EX. 051 - RP	Michael Huppe	Ex. 1 - SoundExchange Initial Rate Proposal, *Webcasting III*
SX EX. 052 - RP	Michael Huppe	Ex. 2 - NAB-SoundExchange Agreement
SX EX. 053 - RP	Michael Huppe	Ex. 3 - NAB-SoundExchange Joint Motion to Adopt Partial Settlement, June 1, 2009
SX EX. 054 - RP	Michael Huppe	Ex. 4 - NAB Petition to Participate
SX EX. 055 - RP	Michael Huppe	Ex. 5 - Sirius XM-SoundExchange Agreement

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Webcasting III

PROPOSED RATES AND TERMS OF SOUNDEXCHANGE, INC.

Pursuant to Section 351.4(b)(3) of the Copyright Royalty Judges' Rules and Procedures, 37 C.F.R. § 351.4(b)(3), SoundExchange, Inc. ("SoundExchange") proposes the rates and terms set forth herein for eligible nonsubscription transmissions and transmissions made by a new subscription service other than a service as defined in 37 C.F.R. § 383.2(h) (collectively, "Webcast Transmissions"), together with the making of ephemeral recordings necessary to facilitate Webcast Transmissions, under the statutory licenses set forth in 17 U.S.C. §§ 112(e) and 114 during the period January 1, 2011 through December 31, 2015.

Pursuant to 37 C.F.R. § 351.4(b)(3), SoundExchange reserves the right to revise its proposed rates and terms at any time during the proceeding up to, and including, the filing of its proposed findings of fact and conclusions of law.

I. Proposed Settlements

On June 1, 2009, SoundExchange and the National Association of Broadcasters ("NAB") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright Royalty Judges adopt certain rates and terms for "Broadcast Retransmissions" and "Broadcaster Webcasts," as defined therein. On August 13, 2009, SoundExchange and College Broadcasters, Inc. ("CBI") submitted a Joint Motion to Adopt Partial Settlement requesting that the Copyright

Royalty Judges adopt certain rates and terms for eligible nonsubscription transmissions made by noncommercial educational webcasters over the internet, as more specifically provided therein. SoundExchange requests adoption by the Copyright Royalty Judges of the proposed regulations appended to the NAB and CBI motions as the statutory rates and terms for the activities addressed therein. SoundExchange respectfully urges the Copyright Royalty Judges to publish those proposed regulations promptly for notice and comment pursuant to 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2), because completing the notice and comment process with respect to those settlements would allow the Copyright Royalty Judges and the parties to know the status of those settlements and hopefully narrow the range of issues potentially at issue in this proceeding.

II. Other Royalty Rates

For all Webcast Transmissions and related ephemeral recordings not covered by its proposed settlements with NAB and CBI, SoundExchange requests royalty rates as set forth below.

A. Commercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are commercial webcasters (as defined in 37 C.F.R. § 380.2(d)) pay an annual, nonrefundable minimum fee of $500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed settlement with NAB), subject to an annual cap of $50,000.00 for a licensee with 100 or more channels or

stations. For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B). Upon payment of the minimum fee, a licensee would receive a credit in the amount of the minimum fee against any additional royalty fees payable in the same calendar year.

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by commercial webcasters as defined in 37 C.F.R. § 380.2(d), in addition to the minimum fee, SoundExchange requests royalty rates as follows:

Year	Rate Per Performance
2011	$0.0021
2012	$0.0023
2013	$0.0025
2014	$0.0027
2015	$0.0029

B. Noncommercial Webcasters

1. Minimum Fee

Pursuant to 17 U.S.C. §§ 112(e)(3) and (4) and 114(f)(2)(A) and (B), SoundExchange requests that all licensees (as defined in 37 C.F.R. § 380.2(g)) that are noncommercial webcasters (as defined in 37 C.F.R. § 380.2(h)) pay an annual, nonrefundable minimum fee of $500.00 for each calendar year or part of a calendar year of the license period during which they are licensees, for each individual channel and each individual station (including any side channel maintained by a broadcaster that is a licensee, if not covered by SoundExchange's proposed

settlement with CBI). For each licensee, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 U.S.C. §§ 112(e)(4) and 114(f)(2)(B).

2. Per Performance Rates

For Webcast Transmissions and related ephemeral recordings by noncommercial webcasters as defined in 37 C.F.R. § 380.2(h), SoundExchange requests that if, in any month, a noncommercial webcaster makes total transmissions in excess of 159,140 aggregate tuning hours (as defined in 37 C.F.R. § 380.2(a)) on any individual channel or station, the noncommercial webcaster shall pay additional fees for the transmissions it makes on that channel or station in excess of 159,140 aggregate tuning hours at the following rates:

Year	Rate Per Performance
2011	$0.0021
2012	$0.0023
2013	$0.0025
2014	$0.0027
2015	$0.0029

C. Ephemeral Recordings

SoundExchange requests that the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral recordings used by the licensee solely to facilitate transmissions for which it pays royalties as provided above shall be included within, and constitute 5% of, such royalty payments.

III. Terms

SoundExchange requests that the terms currently set forth in 37 C.F.R. Part 380 be continued, subject to the changes described herein.

A. Server Log Retention

SoundExchange requests that the regulations expressly confirm that the records a licensee is required to retain pursuant to 37 C.F.R. § 380.4(h), and that are subject to audit under 37 C.F.R. § 380.6, include original server logs sufficient to substantiate rate calculation and reporting, which must be made available to the qualified auditor selected by the Collective in the event of an audit.

B. Late Fees for Reports of Use

SoundExchange requests that reports of use be added to the list in 37 C.F.R. § 380.4(e) of items that, if provided late, would trigger liability for late fees.

C. Identification of Licensees

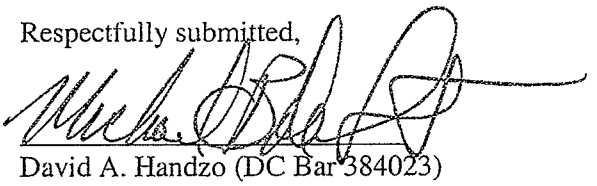
SoundExchange requests that the regulations require statements of account to correspond to notices of use and reports of use by (1) identifying the licensee in exactly the way it is identified on the corresponding notice of use and report of use, and (2) covering the same scope of activity (e.g., the same channels or stations). In addition, SoundExchange requests that the regulations make clear that the "Licensee" is the entity identified on the notice of use, statement of account, and report of use, and that each "Licensee" must submit its own notices of use, statements of account, and reports of use. Finally, SoundExchange requests that the regulations require licensees to use an account number, that is assigned to them by SoundExchange, on their statements of account and reports of use.

D. Technical and Conforming Changes

SoundExchange requests certain technical and conforming changes to the regulations, including ones for the sake of clarity or consistency across licenses. These proposed changes are reflected in the redlined proposed regulations that SoundExchange is submitting as an attachment

hereto. Only provisions affected by these technical and conforming changes are included in the redlined attachment.

Respectfully submitted,



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September 29, 2009

Attachment
SoundExchange's Requested Technical and Conforming Changes

PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

§ 380.1 General.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and ~~digital audio services~~Licensees shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 380.2 Definitions.

(g) *Licensee* is a person that has obtained a statutory license under 17 U.S.C. 114, and the implementing regulations, to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)) other than a Service as defined in § 383.2(h), or that has obtained a statutory license under 17 U.S.C. 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

§ 380.4 Terms for making payment of royalty fees and statements of account.

(b)(2)(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty ~~Board~~Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized ~~such~~the Collective.

(c) *Monthly payments.* A Licensee shall make any payments due under § 380.3 ~~by~~on a monthly basis on or before the 45th day after the end of each month for that month, except that payments due under § 380.3 for the period beginning January 1, 2006, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(g)(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Licensee, such ~~distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State~~royalties shall be handled in accordance with § 380.8.

§ 380.6 Verification of royalty payments.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty ~~Board~~Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

§ 380.7 Verification of royalty distributions.

(c) *Notice of intent to audit.* A Copyright Owner or Performer must file with the Copyright Royalty ~~Board~~Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

Society for Testing and Materials (ASTM) publication "Standard Specification for Roof and Rock Bolts and Accessories" (ASTM F432–95).

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **ADDRESSES** section of this notice, or viewed on the internet by accessing the MSHA home page (*http://www.msha.gov/*) and selecting "Rules & Regs", and then selecting "FedReg. Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** Notice.

III. Current Actions

MSHA is seeking to continue the requirement for mine operators to obtain certification from the manufacturer that roof and rock bolts and accessories are manufactured and tested in accordance with the applicable American Society for Testing and Materials (ASTM) specifications and make that certification available to an authorized representative of the Secretary.

Type of Review: Extension.
Agency: Mine Safety and Health Administration.
Title: Safety Standards for Roof Bolts in Metal and Nonmetal Mines and Underground Coal Mines.
OMB Number: 1219–0121.
Frequency: On occasion.
Affected Public: Business or other for-profit.
Respondents: 833.
Responses: 3,292.
Total Burden Hours: 165 hours.
Total Burden Cost (capital/startup): $0.
Total Burden Cost (operating/maintaining): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated at Arlington, Virginia, this 25th day of February, 2009.

John Rowlett.

Director, Management Services Division.

[FR Doc. E9–4417 Filed 3–2–09; 8:45 am]
BILLING CODE 4510–43–P

LIBRARY OF CONGRESS

Copyright Office

Notification of Agreements Under the Webcaster Settlement Act of 2008

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreement.

SUMMARY: The Copyright Office is publishing three agreements which set rates and terms for the reproduction and performance of sound recordings made by certain specified webcasters, under two statutory licenses. Webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreements published herein rather than the rates and terms of any determination by the Copyright Royalty Judges.

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Attorney Advisor, or Tanya M. Sandros, Deputy General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366. See the final paragraph of the **SUPPLEMENTARY INFORMATION** for information on where to direct questions regarding the rates and terms set forth in the agreement.

SUPPLEMENTARY INFORMATION: On October 16, 2008, President Bush signed into law the Webcaster Settlement Act of 2008 ("WSA"), Public Law 110–435, 122 Stat. 4974, which amends Section 114 of the Copyright Act, title 17 of the United States Code, as it relates to webcasters. The WSA allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002, order for collecting royalty payments made by eligible nonsubscription transmission services under the Section 112 and Section 114 statutory licenses, see 67 FR 45239 (July 8, 2002), to enter into agreements on behalf of all copyright owners and performers to set rates, terms and conditions for webcasters operating under the Section 112 and Section 114 statutory licenses for a period of not more than 11 years beginning on January 1, 2005. The authority to enter into such settlement agreements expired on February 15, 2009.

Unless otherwise agreed to by the parties to an agreement, the rates and terms set forth in such agreements apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings. To make this point clear, Congress included language expressly addressing the precedential value of such agreements. Specifically, Section 114(f)(5)(C), as added by the WSA, states that: "Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or Section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in Section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subSection." 17 U.S.C. 114(f)(5)(C) (2009).

On February 13, 2009, SoundExchange and the Corporation for Public Broadcasting ("CPB") notified the Copyright Office that they had negotiated an agreement for the reproduction and performance of sound

recordings by small commercial webcasters under the Section 112 and Section 114 statutory licenses and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under Section 114(f)(5)(B) of the Copyright Act, as amended by the WSA.

On February 15, 2009, SoundExchange and the National Association of Broadcasters ("NAB") notified the Copyright Office that they had negotiated an agreement for the reproduction and performance of sound recordings by small commercial webcasters under the Section 112 and Section 114 statutory licenses and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under Section 114(f)(5)(B) of the Copyright Act, as amended by the WSA.

On February 15, 2009, SoundExchange and the Small Webcasters [1] notified the Copyright Office that they had negotiated an agreement for the reproduction and performance of sound recordings by small commercial webcasters under the Section 112 and Section 114 statutory licenses and requested that the Copyright Office publish the Rates and Terms in the **Federal Register**, as required under Section 114(f)(5)(B) of the Copyright Act, as amended by the WSA.

Thus, in accordance with the requirement set forth in amended Section 114(f)(5)(B), the Copyright Office is publishing the submitted agreements, as Appendix A (Agreement made between SoundExchange and CPB); Appendix B (Agreement made between SoundExchange and NAB); and Appendix C (Agreement made between SoundExchange and Small Webcasters), thereby making the rates and terms in the agreements available to any webcasters meeting the respective eligibility conditions of the agreements as an alternative to the rates and terms of any determination by the Copyright Royalty Judges.

The Copyright Office has no responsibility for administering the rates and terms of the agreement beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreement should be directed to SoundExchange (for contact information, see *http://www.soundexchange.com*).

Dated: February 24, 2009.

Marybeth Peters,

Register of Copyrights.

Note: The following Appendices will not be codified in the Code of Federal Regulations.

Appendix A

Agreement Concerning Rates and Terms

This Agreement Concerning Rates and Terms ("*Agreement*"), dated as of January 13, 2009 ("*Execution Date*"), is made by and between SoundExchange, Inc. ("*SoundExchange*") and the Corporation for Public Broadcasting ("*CPB*"), on behalf of all Covered Entities (SoundExchange, and CPB each a "*Party*" and, jointly, the "*Parties*"). Capitalized terms used herein are defined in Article 1 below.

Whereas, SoundExchange is the "receiving agent" as defined in 17 U.S.C. 114(f)(5)(E)(ii) designated for collecting and distributing statutory royalties received from Covered Entities for their Web Site Performances;

Whereas, the Webcaster Settlement Act of 2008 (codified at 17 U.S.C. 114(f)(5)) authorizes SoundExchange to enter into agreements for the reproduction and performance of Sound Recordings under Sections 112(e) and 114 of the Copyright Act that, once published in the **Federal Register**, shall be binding on all Copyright Owners and Performers, in lieu of any determination by the Copyright Royalty Judges;

Whereas, in view of the unique business, economic and political circumstances of CPB, Covered Entities, SoundExchange, Copyright Owners and Performers at the Execution Date, the Parties have agreed to the royalty rates and other consideration set forth herein for the period January 1, 2005 through December 31, 2010;

Now, therefore, pursuant to 17 U.S.C. 114(f)(5), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

Article 1

Definitions

The following terms shall have the meanings set forth below:

1.1 "*Agreement*" shall have the meaning set forth in the preamble.

1.2 "*ATH*" or "*Aggregate Tuning Hours*" means the total hours of programming that Covered Entities have transmitted during the relevant period to all listeners within the United States from all Covered Entities that provide audio programming consisting, in whole or in part, of Web Site Performances, less the actual running time of any sound recordings for which the Covered Entity has obtained direct licenses apart from this Agreement. By way of example, if a Covered Entity transmitted one hour of programming to ten (10) simultaneous listeners, the Covered Entity's Aggregate Tuning Hours would equal ten (10). If three (3) minutes of that hour consisted of transmission of a directly licensed recording, the Covered Entity's Aggregate Tuning Hours would equal nine (9) hours and thirty (30) minutes. As an additional example, if one listener listened to a Covered Entity for ten (10) hours (and none of the recordings transmitted during that time was directly licensed), the Covered Entity's Aggregate Tuning Hours would equal 10.

1.3 "*Authorized Web Site*" means any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator ("*URL*") owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.

1.4 "*CPB*" shall have the meaning set forth in the preamble.

1.5 "*Collective*" shall have the meaning set forth in 37 CFR 380.2(c).

1.6 "*Copyright Owners*" are Sound Recording copyright owners who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

1.7 "*Covered Entities*" means NPR, American Public Media, Public Radio International, and Public Radio Exchange, and, in calendar years 2005 through 2007, up to four-hundred and fifty (450) Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Covered Entities hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations considered to be Covered Entities is permitted to grow by no more than 10 Originating Public Radio Stations per year beginning in calendar year 2008, such that the total number of Covered Entities at the end of the Term will be less than or equal to 480. The Parties agree that the number of Originating Public Radio Stations licensed hereunder as Covered Entities shall not exceed the maximum number permitted for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Covered Entities as provided in Section 4.4.

1.8 "*Ephemeral Phonorecord*" shall have the meaning set forth in Section 3.1(b).

1.9 "*Execution Date*" shall have the meaning set forth in the preamble.

1.10 "*License Fee*" shall have the meaning set forth in Section 4.1.

1.11 "*Music ATH*" means ATH of Web Site Performances of Sound Recordings of musical works.

1.12 "*NPR*" shall mean National Public Radio, with offices at 635 Massachusetts Avenue, NW., Washington, DC 20001.

1.13 "*Originating Public Radio Stations*" shall mean a noncommercial terrestrial radio broadcast station that (i) is licensed as such by the Federal Communications Commission; (ii) originates programming and is not solely a repeater station; (iii) is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or

[1] The "Small Webcasters" that negotiated the agreement are Attention Span Radio; Blogmusik (Deezer.com); Born Again Radio; Christmas Music 24/7; Club 80's Internet Radio; Dark Horse Productions; Edgewater Radio; Forever Cool (Forevercool.us); Indiwaves (Set YourMusicFree.com); Ludlow Media (MandarinRadio.com); Musical Justice; My Jazz Network; PartiRadio; Playa Cofi Jukebox (Tropicalglen.com); Soulsville Online; taintradio; Voice of Country; and Window To The World Communications (WFMT.com).

another public radio station that is qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; (iv) qualifies as a "noncommercial webcaster" under 17 U.S.C. 114(f)(5)(E)(i); and (v) either (a) offers Web Site Performances only as part of the mission that entitles it to be exempt from taxation under Section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501), or (b) in the case of a governmental entity (including a Native American tribal governmental entity), is operated exclusively for public purposes.

1.14 *"Party"* shall have the meaning set forth in the preamble.

1.15 *"Performers"* means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the individuals and entities identified in 17 U.S.C. 114(g)(2)(D).

1.16 *"Person"* means a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

1.17 *"Phonorecords"* shall have the meaning set forth in 17 U.S.C. 101.

1.18 *"Side Channel"* means any Internet-only program available on an Authorized Web Site or an archived program on such Authorized Web Site that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

1.19 *"SoundExchange"* shall have the meaning set forth in the preamble and shall include any successors and assigns to the extent permitted by this Agreement.

1.20 *"Sound Recording"* shall have the meaning set forth in 17 U.S.C. 101.

1.21 *"Term"* shall have the meaning set forth in Section 7.1.

1.22 *"Territory"* means the United States, its territories, commonwealths and possessions.

1.23 *"URL"* shall have the meaning set forth in Section 1.3.

1.24 *"Web Site"* means a site located on the World Wide Web that can be located by a Web Site User through a principal URL.

1.25 *"Web Site Performances"* means all public performances by means of digital audio transmissions of Sound Recordings, including the transmission of any portion of any Sound Recording, made through an Authorized Web Site in accordance with all requirements of 17 U.S.C. 114, from servers used by a Covered Entity (*provided that* the Covered Entity controls the content of all materials transmitted by the server), or by a sublicensee authorized pursuant to Section 3.2, that consist of either (a) the retransmission of a Covered Entity's over-the-air terrestrial radio programming or (b) the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Covered Entity. This term does not include digital audio transmissions made by any other means.

1.26 *"Web Site Users"* means all those who access or receive Web Site Performances or who access any Authorized Web Site.

Article 2

Agreement Pursuant to Webcaster Settlement Act of 2008

2.1 *General.* This Agreement is entered into pursuant to the Webcaster Settlement Act of 2008 (Pub. L. 110–435; to be codified at 17 U.S.C. 114(f)(5)).

2.2 *Eligibility Conditions.* The only webcasters (as defined in 17 U.S.C. 114(f)(5)(E)(iii)) eligible to avail themselves of the terms of this Agreement as contemplated by 17 U.S.C. 114(f)(5)(B) are the Covered Entities, as expressly set forth herein. The terms of this Agreement shall apply to the Covered Entities in lieu of other rates and terms applicable under 17 U.S.C. 112 and 114.

2.3 *Agreement Nonprecedential.* Consistent with 17 U.S.C. 114(f)(5)(C), this Agreement, including any rate structure, fees, terms, conditions, and notice and recordkeeping requirements set forth therein, is nonprecedential and shall not be introduced nor used by any Person, including the Parties and any Covered Entities, admissible as evidence or otherwise taken into account in any administrative, judicial, or other proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under 17 U.S.C. 114(f)(4) or 112(e)(4), or any administrative or judicial proceeding pertaining to rates, terms or reporting obligations for any yet-to-be-created right to collect royalties for the performance of Sound Recordings by any technology now or hereafter known. Any royalty rates, rate structure, definitions, terms, conditions and notice and recordkeeping requirements included in this Agreement shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers, and the pending appeal of the decision of the Copyright Royalty Judges by NPR on behalf of itself and its member stations, rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in Section 801(b) of the Copyright Act.

2.4 *Reservation of Rights.* The Parties agree that the entering into of this Agreement shall be without prejudice to any of their respective positions in any proceeding with respect to the rates, terms or reporting obligations to be established for the making of Ephemeral Phonorecords or the digital audio transmission of Sound Recordings after the Term of this Agreement on or by Covered Entities under 17 U.S.C. 112 and 114 and their implementing regulations. The Parties further acknowledge and agree that the entering of this Agreement, the performance of its terms, and the acceptance of any payments and reporting by SoundExchange (i) do not express or imply any acknowledgement that CPB, Covered Entities, or any other persons are eligible for the statutory license of 17 U.S.C. 112 and 114, and (ii) shall not be used as evidence that CPB, the Covered Entities, or any other persons are acting in compliance with the provisions of 17 U.S.C. 114(d)(2)(A) or (C) or any other applicable laws or regulations.

Article 3

Scope of Agreement

3. *General.*

(a) *Public Performances.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that publicly perform under Section 114 all or any portion of any Sound Recordings through an Authorized Web Site, within the Territory, by means of Web Site Performances, may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such transmissions are made in strict conformity with the provisions of 17 U.S.C. 114(d)(2)(A) and (C); and (ii) such Covered Entities comply with all of the terms and conditions of this Agreement and all applicable copyright laws. For clarity, there is no limit to the number of Web Site Performances that a Covered Entity may transmit during the Term under the provisions of this Section 3.1(a), if such Web Site Performances otherwise satisfy the requirements of this Agreement.

(b) *Ephemeral Phonorecords.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that make and use solely for purposes of transmitting Web Site Performances as described in Section 3.1(a), within the Territory, Phonorecords of all or any portion of any Sound Recordings (*"Ephemeral Phonorecords"*), may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such Phonorecords are limited solely to those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances licensed hereunder; (ii) such Phonorecords are made in strict conformity with the provisions set forth in 17 U.S.C. 112(e)(1)(A)–(D); and (iii) the Covered Entities comply with 17 U.S.C. 112(a) and (e) and all of the terms and conditions of this Agreement.

3.2 *Limited Right to Sublicense.* Rights under this Agreement are not sublicensable, except that a Covered Entity may employ the services of a third Person to provide the technical services and equipment necessary to deliver Web Site Performances on behalf of such Covered Entity pursuant to Section 3.1, but only through an Authorized Web Site. Any agreement between a Covered Entity and any third Person for such services shall (i) contain the substance of all terms and conditions of this Agreement and obligate such third Person to provide all such services in accordance with all applicable terms and conditions of this Agreement, including, without limitation, Articles 3, 5 and 6; (ii) specify that such third Person shall have no right to make Web Site Performances or any other performances or Phonorecords on its own behalf or on behalf of any Person or entity other than a Covered Entity through the Covered Entity's Authorized Web Site by

virtue of this Agreement, including in the case of Phonorecords, pre-encoding or otherwise establishing a library of Sound Recordings that it offers to a Covered Entity or others for purposes of making performances, but instead must obtain all necessary licenses from SoundExchange, the copyright owner or another duly authorized Person, as the case may be; (iii) specify that such third Person shall have no right to grant any further sublicenses; and (iv) provide that SoundExchange is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third party.

3.3 *Limitations.*

(a) *Reproduction of Sound Recordings.* Except as provided in Section 3.2, nothing in this Agreement grants Covered Entities, or authorizes Covered Entities to grant to any other Person (including, without limitation, any Web Site User, any operator of another Web Site or any authorized sublicensee), the right to reproduce by any means, method or process whatsoever, now known or hereafter developed, any Sound Recordings, including, but not limited to, transferring or downloading any such Sound Recordings to a computer hard drive, or otherwise copying the Sound Recording onto any other storage medium.

(b) *No Right of Public Performance.* Except as provided in Section 3.2, nothing in this Agreement authorizes Covered Entities to grant to any Person the right to perform publicly, by means of digital transmission or otherwise, any Sound Recordings.

(c) *No Implied Rights.* The rights granted in this Agreement extend only to Covered Entities and grant no rights, including by implication or estoppel, to any other Person, except as expressly provided in Section 3.2. Without limiting the generality of the foregoing, this Agreement does not grant to Covered Entities (i) any copyright ownership interest in any Sound Recording; (ii) any trademark or trade dress rights; (iii) any rights outside the Territory; (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other Person; or (v) any rights outside the scope of a statutory license under 17 U.S.C. 112(e) and 114.

(d) *Territory.* The rights granted in this Agreement shall be limited to the Territory.

(e) *No Syndication Rights.* Nothing in this Agreement authorizes any Web Site Performances to be accessed by Web Site Users through any Web Site other than an Authorized Web Site.

3.4 *Effect of Non-Performance by any Covered Entity.* In the event that any Covered Entity breaches or otherwise fails to perform any of the material terms of this Agreement it is required to perform (including any obligations applicable under Section 112 or 114), or otherwise materially violates the terms of this Agreement or Section 112 or 114 or their implementing regulations, the remedies of SoundExchange shall be specific to that Covered Entity only, and shall include, without limitation, (i) termination of that Covered Entity's rights hereunder upon written notice to CPB, and (ii) the rights of SoundExchange and Copyright owners under applicable law. SoundExchange's remedies for such a breach or failure by an individual Covered Entity shall not include termination of this Agreement in its entirety or termination of the rights of other Covered Entities, except that if CPB breaches or otherwise fails to perform any of the material terms of this Agreement, or such a breach or failure by a Covered Entity results from CPB's inducement, and CPB does not cure such breach or failure within thirty (30) days after receiving notice thereof from SoundExchange, then SoundExchange may terminate this Agreement in its entirety, and a prorated portion of the License Fee for the remainder Term shall, after deduction of any damages payable to SoundExchange by virtue of the breach or failure, be credited to statutory royalty obligations of Covered Entities to SoundExchange for the Term as specified by CPB.

Article 4

Consideration

4.1 *License Fee.* The total license fee for all Web Site Performances and Ephemeral Phonorecords made during the Term shall be one million eight hundred and fifty thousand dollars ($1,850,000) (the *"License Fee"*), unless additional payments are required as described in Section 4.3 or 4.4. The Parties acknowledge that CPB has paid SoundExchange two hundred and fifty thousand dollars ($250,000) of such amount prior to the Execution Date. Within ten (10) business days after publication of this Agreement in the **Federal Register**, CPB shall pay SoundExchange the balance of one million six hundred thousand dollars ($1,600,000).

4.2 *Calculation of License Fee.* The Parties acknowledge that the License Fee includes: (i) An annual minimum fee of five hundred dollars ($500) for each Covered Entity for each year during the Term, except that the annual minimum fee was calculated at two hundred and fifty dollars ($250) per year for each Covered Entity substantially all of the programming provided by which is reasonably classified as news, talk, sports or business programming; (ii) additional usage fees calculated in accordance with the royalty rate structure applicable to noncommercial webcasters under the Small Webcaster Settlement Act of 2002 (see 68 FR 35,008 (June 11, 2003)); and (iii) a discount that reflects the administrative convenience to SoundExchange of receiving one payment that covers a large number of separate entities for six (6) calendar years, as well as the "time value" of money and protection from bad debt that arises from being paid in advance for calendar years 2009 and 2010.

4.3 *Total Music ATH True-Up:* If the total Music ATH for all Covered Entities, in the aggregate for calendar years 2008, 2009 and 2010 combined, as estimated in accordance with the methodology described in Attachment 1, is greater than seven hundred sixty four million six hundred thousand (764,600,000) (approximately the amount that would result from 10% year-over-year Music ATH growth in 2008, 2009 and 2010), CPB shall make an additional payment to SoundExchange for all such Music ATH in excess of seven hundred sixty four million six hundred thousand (764,600,000) for all Covered Entities in the aggregate at the rate of $0.00251 per ATH. Such payment shall be due no later than March 1, 2011.

4.4 *Station Growth True-Up:* If the total number of Originating Public Radio Stations that wish to make Web Site Performances in any of calendar year 2008, 2009 and 2010 exceeds the number of such Originating Public Radio Stations considered Covered Entities in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Web Site Performances apart from this Agreement, CPB may elect by written notice to SoundExchange to increase the number of Originating Public Radio Stations considered Covered Entities in the relevant year effective as of the date of the notice. To the extent of any such elections for all or any part of calendar year 2008, 2009 or 2010, CPB shall make an additional payment to SoundExchange for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Covered Entity, in the amount of five hundred dollars ($500) per Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Covered Entity.

4.5 *Late Fee.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(e) as if that Section (and the applicable definitions provided in 37 CFR 380.2) were set forth herein.

4.6. *Payments to Third Persons.*

(a) SoundExchange and CPB agree that, except as provided in Section 4.6(b), all obligations of, *inter alia,* clearance, payment or attribution to third Persons, including, by way of example and not limitation, music publishers and performing rights organizations (PROs) for use of the musical compositions embodied in Sound Recordings, shall be solely the responsibility of CPB and the Covered Entities.

(b) SoundExchange and CPB agree that all obligations of distribution of the License Fee to Copyright Owners and Performers in accordance with 37 C.F.R 380.4(g) shall be solely the responsibility of SoundExchange. In making such distribution, SoundExchange has discretion to allocate the License Fee between Section 112 and 114 in the same manner as the majority of other webcasting royalties.

Article 5

Reporting, Auditing and Confidentiality

5.1 *Reporting.* CPB and Covered Entities shall submit reports of use concerning Web Site Performances as set forth in Attachments 1 and 2.

5.2 *Verification of Information.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(h) and 380.6 as if those Sections (and the applicable definitions provided in 37 CFR 380.2) were set forth herein. The exercise by SoundExchange of any right under this Section 5.2 shall not prejudice any other rights or remedies of SoundExchange.

5.3 *Confidentiality.* The Parties hereby agree to the terms set forth in 37 CFR § 380.5 as if that Section (and the applicable definitions provided in 37 CFR § 380.2) were set forth herein, except that:

(a) The following shall be added to the end of the first sentence of § 380.5(b): "or documents or information that become publicly known through no fault of SoundExchange or are known by SoundExchange when disclosed by CPB";

(b) The following shall be added at the end of § 380.5(c): "and enforcement of the terms of this Agreement"; and

(c) The following shall be added at the end of § 380.5(d)(4): "subject to the provisions of Section 2.3 of this Agreement"

Article 6

Non-Participation In Further Proceedings

CPB and any Covered Entity making Web Site Transmissions in reliance on this Agreement shall not directly or indirectly participate as a party, *amicus curiae* or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for digital audio transmission or the reproduction of Ephemeral Phonorecords under Section 112 or 114 of the Copyright Act for all or any part of the Term, including any appeal of the Final Determination of the Copyright Royalty Judges, published in the **Federal Register** at 72 FR 24084 (May 1, 2007), any proceedings on remand from such an appeal, or any other related proceedings, unless subpoenaed on petition of a third party (without any action by CPB or a Covered Entity to encourage such a petition) and ordered to testify in such proceeding. Notwithstanding anything to the contrary herein, any entity that is eligible to be treated as a "Covered Entity" but that that does not elect to be treated as a Covered Entity may elect to participate in such proceedings.

Article 7

Term and Termination

7.1 *Term.* The term of this Agreement commenced as of January 1, 2005, and ends as of December 31, 2010 *("Term").* As conditions precedent to reliance on the terms of this Agreement by any Covered Entity, (a) CPB must pay the License Fee as and when specified in Section 4.1, and (b) NPR must withdraw its appeal of the Final Determination of the Copyright Royalty Judges, published in the **Federal Register** at 72 FR 24084 (May 1, 2007), which it has agreed to do within ten (10) days after the publication of this Agreement in the **Federal Register.**

7.2 *Mutual Termination.* This Agreement may be terminated in writing upon mutual agreement of the Parties.

7.3 *Consequences of Termination.*

(a) *Survival of Provisions.* In the event of the expiration or termination of this Agreement for any reason, the terms of this Agreement shall immediately become null and void, and cannot be relied upon for making any further Web Site Performances or Ephemeral Phonorecords, except that (i) Articles 6 and 8 and Sections 2.3, 5.2 and 7.3 shall remain in full force and effect; and (ii) Article 4 and Section 5.1 shall remain in effect after the expiration or termination of this Agreement to the extent obligations under Article 4 or Section 5.1 accrued prior to any such termination or expiration.

(b) *Applicability of Copyright Law.* Any Web Site Performances made by a Covered Entity or other Originating Public Radio Station in violation of the terms of this Agreement or Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with this Agreement), outside the scope of this Agreement, or after the expiration or termination of this Agreement for any reason shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106(6), the remedies in 17 U.S.C. 501 *et seq.*, the provisions of 17 U.S.C. 112(e) and 114, and their implementing regulations unless the Parties have entered into a new agreement for such Web Site Performances.

Article 8

Miscellaneous

8.1 *Applicable Law and Venue.* This Agreement shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with this Agreement shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. The Parties and Covered Entities, to the extent permitted under their state or tribal law, consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the Person for which it is intended at its address set forth in this Agreement (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

8.2 *Rights Cumulative.* The remedies provided in this Agreement and available under applicable law shall be cumulative and shall not preclude assertion by any Party of any other rights or the seeking of any other remedies against the other Party hereto. This Agreement shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with this Agreement). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. Neither this Agreement nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under this Agreement or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by either Party of full performance by the other Party in any one or more instances shall be a waiver of the right to require full and complete performance of this Agreement and of obligations under applicable law thereafter or of the right to exercise the remedies of SoundExchange under Section 3.4.

8.3 *Severability.* Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provisions shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

8.4 *Amendment.* This Agreement may be modified or amended only by a writing signed by the Parties.

8.5 *Entire Agreement.* This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

8.6 *Headings.* The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

In witness whereof, the Parties hereto have executed this Agreement as of the date first above written.

Attachment 1

Reporting

1. *Definitions.* The following terms shall have the meaning set forth below for purposes of this Attachment 1. All other capitalized terms shall have the meaning set forth in Article 1 of the Agreement.

(a) *"Content Logs"* shall have the meaning set forth in Section 4(a)(ii) of this Attachment 1.

(b) *"Current Period"* shall mean the period commencing with the first day after the end of the Historic Period and continuing to the end of the Term.

(c) *"Historic Period"* shall mean the period from April 1, 2004 through the last day of the month of the Execution Date.

(d) *"Major Format Group"* shall mean each of the following format descriptions characterizing the programming offered by various Covered Entities: (i) Classical; (ii) jazz; (iii) music mix; (iv) news and information; (v) news/classical; (vi) news/jazz; (vii) news/music mix; and (viii) adult album alternative. A Covered Entity's Major Format Group is determined based on the format description best describing the programming of the principal broadcast service offered by the Covered Entity and will include all channels streamed.

(e) *"Reporting Data"* shall mean, for each Sound Recording for which Reporting Data is to be provided, (1) the relevant Covered Entity (including call sign and community of license of any terrestrial broadcast station and any Side Channel(s)); (2) the title of the song or track performed; (3) the featured recording artist, group, or orchestra; (4) the title of the commercially available album or other product on which the Sound Recording is found; (5) the marketing label of the commercially available album or other product on which the sound recording is found; and (6) play frequency.

(f) *"Specified Reports"* are reports that provide Reporting Data concerning over-the-air performances of Sound Recordings that are also Web Site Performances by an

Originating Public Radio Station. The Parties agree that such reports will initially be the ones provided by Mediaguide, Inc. or a successor thereto ("Mediaguide"). In the event that Mediaguide, or other agreed-upon source of Specified Reports, should cease to provide Reporting Data that satisfy the function of such reports hereunder, the Parties shall promptly identify and agree upon an alternative vendor of reports, or an alternative approach to providing Reporting Data to SoundExchange, provided that such alternative reports or approaches are available on commercial terms comparable to Mediaguide reports.

2. *General.*

All data required to be provided hereunder shall be provided to SoundExchange electronically in the manner provided in 37 CFR 370.3(d), except to the extent the parties agree otherwise. CPB shall consult with SoundExchange in advance concerning the content and format of all data to be provided hereunder, and shall provide data that is accurate, to the best of CPB's and the relevant Covered Entity's knowledge, information and belief. The methods used to make estimates, predictions and projections of data shall be subject to SoundExchange's prior written approval, which shall not be unreasonably withheld.

3. *Data for the Historic Period:*

(a) *For 2004.* CPB and SoundExchange shall use reasonable efforts to obtain available Specified Reports regarding Covered Entities for the period April 1, 2004 through December 31, 2004. NPR has previously provided SoundExchange with all available Music ATH data from the Music Webcasting Report dated September, 2004, in the form of an Excel spreadsheet. CPB represents that such data includes Music ATH data for all Major Format Groups.

(b) *For 2005–2008.*

(i) If Covered Entities have Reporting Data, or other information reportable under 37 CFR Part 370, with respect to Web Site Performances during the Historic Period, such Covered Entities shall provide such information to CPB, which shall provide the same to SoundExchange, as soon as practicable, and in any event by no later than sixty (60) days after the end of the Historic Period. Such data shall be provided in a format consistent with Attachment 2.

(ii) CPB and SoundExchange shall use reasonable efforts to obtain available Specified Reports regarding Covered Entities for the Historic Period. CPB and SoundExchange shall each pay one-half of the costs for such Specified Reports.

(iii) CPB has previously provided SoundExchange with the Streaming Census Report dated October 18, 2007 which SoundExchange has accepted which includes estimates of total Music ATH during the Historic Period, and of the allocation thereof to Major Format Groups, Covered Entities and applicable period.

4. *Data Collection and Reporting for the Current Period.* CPB shall provide data regarding Web Site Performances during the Current Period to SoundExchange, and Covered Entities shall provide such data to CPB, consistent with the following terms:

(a) *ATH and Content Logs.* For each calendar quarter during the Current Period:

(i) *Music ATH Reporting.* CPB shall provide reports (the "ATH Reports") of Music ATH by Covered Entities reasonably representative of all Major Format Groups, having relatively high Music ATH among the set of Covered Entities, and representing at least 60% of the total Music ATH by the Covered Entities in 2009 and at least 80% of the total Music ATH by the Covered Entities in 2010. Such ATH reports shall be accompanied by the Content Logs described in Section 4(a)(ii) for the periods described therein for all Covered Entities for which ATH Reports are provided. All ATH Reports and Content Logs for a quarter shall be provided by CPB together in one single batch, but all data shall be broken out by Covered Entity and identify each Covered Entity's Major Format Group. The ATH Reports shall be in a form similar to the Streaming Census Report dated October 18, 2007, which reported two hundred ten million (210,000,000) total Music ATH for all Covered Entities for calendar year 2007, except as otherwise provided in this Section 4(a)(i). If the ATH Reports satisfy the requirements set forth above in this Section 4(a)(i), all Covered Entities shall be deemed in compliance with the terms of this Section 4(a)(i).

(ii) *Reporting Period and Data.* The information about Music ATH referenced in Section 4(a)(i) shall be collected from Covered Entities for two 7-consecutive-day reporting periods per quarter in 2009 and 2010. The first ATH Report shall be provided no later than 180 days after the Execution Date. Thereafter, the ATH Reports shall be provided within thirty (30) days of the end of each calendar quarter. During these reporting periods, Covered Entities described in Section 4(a)(i) above shall prepare logs containing Reporting Data for all their Web Site Performances *("Content Logs").* These Content Logs shall be compared with server-based logs of Music ATH throughout the reporting period before the ATH Report is submitted to SoundExchange.

(iii) *Additional Data Reporting.* Each quarter, CPB shall, for Covered Entities representing the highest 20% of reported Music ATH in 2009 and the highest 30% of reported Music ATH in 2010, provide SoundExchange Reporting Data collected continuously during each 24 hour period for the majority of their Web Site Performances, along with the Covered Entity's Music ATH, for the relevant quarter. If during any calendar quarter of the Current Period, additional Covered Entities, in the ordinary course of business, collect Reporting Data continuously during each 24 hour period for the majority of their Web Site Performances, CPB shall provide SoundExchange such data, along with each such Covered Entity's Music ATH, for the relevant quarter.

(b) *ATH and Format Surveys.* CPB shall semiannually survey all Covered Entities to ascertain the number, format and Music ATH of all channels (including but not limited to Side Channels) over which such Covered Entities make Web Site Performances. CPB shall provide the results of such survey to SoundExchange within sixty (60) days after the end of the semiannual period to which it pertains.

(c) *Consolidated Reporting.* Each quarter, CPB shall provide the information required by this Section 4 in one delivery to SoundExchange, with a list of all Covered Entities indicating which are and are not reporting for such quarter.

(d) *Timing.* Except as otherwise provided above, all information required to be provided to SoundExchange under this Section 4 shall be provided as soon as practicable, and in any event by no later than sixty (60) days after the end of the quarter to which it pertains. Such data shall be provided in a format consistent with Attachment 2.

5. *Development of Technological Solutions.* During the Term, CPB and Covered Entities shall cooperate in good faith with efforts by SoundExchange to develop and test a technological solution that facilitates reporting.

Attachment 2

Reporting Format

1. *Format for Reporting Data.* All Reporting Data provided under Attachment 1, Sections 3(b)(i) and 4(a)(ii) shall be delivered to SoundExchange in accordance with the following format:

Column 1	Station or Side Channel
Column 2	Sound Recording Title
Column 3	Featured Artist, Group or Orchestra
Column 4	Album
Column 5	Marketing Label
Column 6	Play Frequency

2. *Format for Music ATH.* All Music ATH reporting by Covered Entities under the following provisions of Attachment 1 shall be delivered to SoundExchange in accordance with the following format:

a. Section 3(b)(i) (the "Historic Period")

Column 1	Station or Side Channel
Column 2	Major Format Group
Column 3	ATH
Column 4	2004 and 2007

b. Section 4(a)(i) (the "Current Period")

SX EX. 052-6-RP

Column 1	Station or Side Channel
Column 2	Major Format Group
Column 3	ATH
Column 4	Reporting Period

3. *Major Format Groups.* All requirements to provide "Major Format Group" as that term is defined in Attachment 1, Section 1(d), shall correspond with one of the following:

Major format groups
Classical
Jazz
Music Mix
News and Information
News/Classical
News/Jazz
News/Music Mix
Adult Album Alternative

Appendix B—Agreed Rates and Terms for Broadcasters

Article 1—Definitions

1.1 *General.* In general, words used in the rates and terms set forth herein (the "Rates and Terms") and defined in 17 U.S.C. 112(e) or 114 or 37 CFR Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 *Additional Definitions*

(a) *"Broadcaster"* shall mean a webcaster as defined in 17 U.S.C. 114(f)(5)(E)(iii) that (i) has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission; (ii) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (iii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and (iv) is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i).

(b) *"Broadcaster Webcasts"* shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are not Broadcast Retransmissions.

(c) *"Broadcast Retransmissions"* shall mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming transmitted on an internet-only side channel.

(d) *"Eligible Transmission"* shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

(e) *"Small Broadcaster"* shall mean a Broadcaster that, for any of its channels and stations (determined as provided in Section 4.1) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria: (i) During the prior year it made Eligible Transmissions totaling less than 27,777 aggregate tuning hours; and (ii) during the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 aggregate tuning hours; provided that, one time during the period 2006–2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

(f) *"SoundExchange"* shall mean SoundExchange, Inc. and shall include its successors and assigns.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2008

2.1 *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of 2008, and subject to the provisions set forth below, Broadcasters may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, with respect to such Broadcasters' Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Broadcaster must comply with otherwise applicable rates and terms.

2.2 *Election Process in General.* To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015, a Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by the later of (i) March 31, 2009; (ii) 30 days after publication of these Rates and Terms in the **Federal Register**; or (iii) in the case of a Broadcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the **Federal Register** but begins doing so at a later time, 30 days after the Broadcaster begins making such Eligible Transmissions. On any such election form, the Broadcaster must, among other things, identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Broadcaster's corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Broadcaster shall promptly notify SoundExchange thereof. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Broadcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination") or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the **Federal Register** at 74 FR 318–20 (Jan. 5, 2009)) shall not have the right to elect to be treated as a Broadcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 *Election of Small Broadcaster Status.* A Broadcaster that elects to be subject to these Rates and Terms and qualifies as a Small Broadcaster may elect to be treated as a Small Broadcaster for any one or more calendar years that it qualifies as a Small Broadcaster. To do so, the Small Broadcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than the date for the election provided in Section 2.2. On any such election form, the Broadcaster must, among other things, certify that it qualifies as a Small Broadcaster; provide information about its prior year aggregate tuning hours and the formats of its stations (e.g., the genres of music they use); and provide other information requested by SoundExchange for use in creating a royalty distribution proxy. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

2.4 *Representation of Compliance and Non-waiver.* By electing to operate pursuant to the Rates and Terms, an entity represents and warrants that it qualifies as a Broadcaster and/or Small Broadcaster, as the case may be. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Broadcaster or Small Broadcaster or that it

has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Broadcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

Article 3—Scope

3.1 *In General.* In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Broadcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein or waived by particular copyright owners with respect to their respective sound recordings), in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, for all of the period beginning on January 1, 2006, and ending on December 31, 2015.

3.2 *Applicability to All Eligible Services Operated by or for a Broadcaster.* If a Broadcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Broadcaster that qualify as a Performance under 37 CFR 380.2(i), and related ephemeral recordings. For the avoidance of doubt, a Broadcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Broadcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. 112(e) and 114.

Article 4—Royalties

4.1 *Minimum Fees.* Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2006–2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For purposes of these Rates and Terms, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the "Proxy Fee") to SoundExchange for the reporting waiver discussed in Section 5.1.

4.2 *Royalty Rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall, except as provided in Section 5.3, be payable on a per-performance basis, as follows:

Year	Rate per performance
2006	$0.0008
2007	0.0011
2008	0.0014
2009	0.0015
2010	0.0016
2011	0.0017
2012	0.0020
2013	0.0022
2014	0.0023
2015	0.0025

4.3 *MFN.* If at any time between publication of this Agreement in the **Federal Register** and December 31, 2015, SoundExchange enters into an agreement with a Broadcaster specifying terms and conditions for the public performance of sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and the making of related ephemeral recordings within the scope of Section 112(e), upon principal financial or other material terms that are more favorable to such Broadcaster than the principal financial or other material terms set forth in these Rates and Terms, then SoundExchange shall afford electing Broadcasters hereunder the opportunity, in each Broadcaster's sole discretion, to take advantage of the terms and conditions of such agreement, in their entirety, in lieu of these Rates and Terms, with respect to the Broadcaster's Eligible Transmissions, from the date such more favorable terms became effective under such other agreement and continuing until the earlier of (i) the expiration of such other agreement, or (ii) December 31, 2015.

4.4 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Broadcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015, provided that such allocation shall not, by virtue of a Broadcaster's agreement to this Section 4.4, be considered precedent in any judicial, administrative, or other proceeding.

4.5 *Payment.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees and, where applicable, the Proxy Fee shall be paid by January 31 of each year. Once a Broadcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Broadcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.6 *Monthly Obligations.* Broadcasters must make monthly payments where required by Section 4.5, and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

4.7 *Past Periods.* Notwithstanding anything else in this Agreement, to the extent that a Broadcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on February 28, 2009, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than April 30, 2009, including late fees as provided in Section 4.8 from the original due date.

4.8 *Late Fees.* A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange, provided that, in the case of a timely provided but noncompliant statement of account or report of use, SoundExchange has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

Article 5—Reporting, Auditing and Confidentiality

5.1 *Small Broadcasters.* While SoundExchange's ultimate goal is for all webcasters to provide census reporting, requiring census reporting by the smallest Broadcasters at this time may present undue challenges for them, reduce compliance, and significantly increase SoundExchange's distribution costs. Accordingly, on a transitional basis for a limited time and for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these entities, electing Small Broadcasters shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related ephemeral recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 aggregate tuning hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Small Broadcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to SoundExchange a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that offering this option to electing Small Broadcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers. SoundExchange further hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of Small Broadcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. Small Broadcasters should assume that, effective January 1, 2016, they will be required to report their actual usage in full compliance with then-applicable regulations. Small Broadcasters are encouraged to begin to prepare to report their actual usage by that date, and if it is practicable for them to do so earlier, they may wish not to elect Small Broadcaster status.

5.2 *Reporting by Other Broadcasters in General.* Broadcasters other than electing Small Broadcasters covered by Section 5.1 shall submit reports of use on a per-performance basis in compliance with the regulations set forth in 37 CFR Part 370, except that the following provisions shall apply notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hour basis as provided in Section 5.3.

(b) Broadcasters shall submit reports of use to SoundExchange on a monthly basis.

(c) As provided in Section 4.6, Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(d) Except as provided in Section 5.3, Broadcasters shall submit reports of use to SoundExchange on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(e) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

(f) Broadcasters shall transmit each report of use in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single station only, the call letters of the station.

(g) Broadcasters shall submit reports of use with headers, as presently described in 37 CFR 370.3(d)(7).

(h) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the statement covers a single station only, the call letters of the station.

5.3 *Limited ATH-Based Reporting.* Recognizing the operational challenge of census reporting, Broadcasters generally reporting pursuant to Section 5.2 may pay for, and report usage in, a percentage of their programming hours on an aggregate tuning hours basis, if (a) census reporting is not reasonably practical for the programming during those hours, and (b) if the total number of hours on a single report of use, provided pursuant to Section 5.2, for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

Year	Maximum percentage
2009	20%
2010	18%
2011	16%
2012	14%
2013	12%
2014	10%
2015	8%

To the extent that a Broadcaster chooses to report and pay for usage on an aggregate tuning hours basis pursuant to this Section 5.3, the Broadcaster shall (i) report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour; (ii) pay royalties (or recoup minimum fees) at the per-performance rates provided in Section 4.2 on the basis of clause (i) above; (iii) include aggregate tuning hours in reports of use provided pursuant to Section 5.2; and (iv) include in reports of use provided pursuant to Section 5.2 complete playlist information for usage reported on the basis of aggregate tuning hours. SoundExchange may distribute royalties paid on the basis of aggregate tuning hours hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

5.4 *Verification of Information.* The provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. The exercise by SoundExchange of any right under this Section 5.4 shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

5.5 *Confidentiality.* The provisions of applicable regulations concerning confidentiality (presently 37 CFR 380.5 (and the applicable definitions provided in 37 CFR 380.2)) shall apply hereunder.

Article 6—Additional Provisions

6.1 *Applicable Regulations.* To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

6.2 *Participation in Specified Proceedings.* A Broadcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2006–2015 period and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006–2015 period. Thus, once a Broadcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys.* v. *Copyright Royalty Board* (D.C. Circuit Docket Nos. 07–1123, 07–1168, 07–1172, 07–1173, 07–1174, 07–1177, 07–1178, 07–1179), *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009–1 CRB Webcasting III), *Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service* (Copyright Royalty Judges' Docket No. 2009–2 CRB New Subscription II) or any successor proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section

112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Broadcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

6.3 *Use of Agreement in Future Proceedings.*

(a) Consistent with 17 U.S.C. 114(f)(5)(C), and except as specifically provided in Section 6.3(b), neither the Webcaster Settlement Act nor any provisions of these Rates and Terms shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of musical works or sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges.

(b) Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) is expressly authorized. For the avoidance of doubt, this Section 6.3(b) does not authorize participation in a proceeding by an entity that has agreed not to participate in the proceeding (pursuant to Section 6.2 or otherwise).

6.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Broadcaster setting alternative Rates and Terms governing the Broadcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 *Default.* A Broadcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Broadcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Broadcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Broadcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106 and the remedies in 17 U.S.C. 501–506, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 *Acknowledgement.*

(a) The parties acknowledge this agreement was entered into knowingly and willingly.

(b) This agreement is limited solely to webcasting royalties, and the parties acknowledge that it shall not be cited in connection with any efforts to obtain, and sets no precedent related to, over-the-air performance royalties.

(c) The parties further agree that the preceding acknowledgement in Section 7.1(a) does not in any way imply Broadcasters' agreement that the royalty rate standard set forth in 17 U.S.C. 114(f)(2)(B) is an appropriate rate standard to apply to Broadcasters. Broadcasters shall never be precluded by virtue of such acknowledgement from arguing in the context of future legislation or otherwise that a different royalty rate standard should apply to them, and SoundExchange shall never rely upon by such acknowledgement as a basis for arguing that the royalty rate standard set forth in 17 U.S.C. 114(f)(2)(B) should apply to Broadcasters.

7.2 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and Broadcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and a Broadcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Broadcaster with respect to the subject matter hereof.

Appendix C

Agreed Rates and Terms

1. General

(a) *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of 2008, and subject to the provisions of Section 2, Eligible Small Webcasters may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, with respect to their eligible nonsubscription transmissions and related ephemeral recordings, in lieu of other rates and terms applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2 hereof. Any person or entity that does not satisfy the eligibility criteria to be an Eligible Small Webcaster during any calendar year during the period 2006–2015 must comply with otherwise applicable rates and terms for that year.

(b) *Compliance.* Any Eligible Small Webcaster relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those Sections, these Rates and Terms and other applicable regulations.

(c) *Effect of Direct Licenses.* These Rates and Terms are without prejudice to, and subject to, any voluntary agreements that an Eligible Small Webcaster may have entered into with any sound recording copyright owner.

(d) *Precedential Effect of Rates and Terms.* Eligible Small Webcasters agree that these Rates and Terms (including any royalty rates, rate structure, fees, definitions, terms, conditions, or notice and recordkeeping requirements set forth herein), shall not be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding, except as specifically provided in this Section 1(d). This prohibition applies to, but is not limited to, those proceedings involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements. These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of small webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller. Eligible Small Webcasters shall not, in any way, seek to use in any way these Rates and Terms in any such proceeding and further agree to take whatever steps are appropriate to prevent use of such rates and terms in those proceedings. SoundExchange may disclose, describe or explain any provision of these Rates and Terms in any proceeding without giving it precedential effect.

2. Election for Treatment as an Eligible Small Webcaster

(a) *Election Process in General.* An Eligible Small Webcaster that wishes to elect to be subject to these Rates and Terms with respect to its eligible nonsubscription transmissions and related ephemeral recordings, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for any calendar year that it qualifies as an Eligible Small Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than the first date on which the webcaster would be obligated under these Rates and Terms to make a royalty payment for such year. An Eligible Small Webcaster that fails to make a timely election shall pay royalties for the relevant year as otherwise provided under 17 U.S.C. 112 and 114.

(b) *Election of Microcaster Status.* An Eligible Small Webcaster that elects to be subject to these Rates and Terms and qualifies as a Microcaster may elect to be treated as a Microcaster for any one or more calendar years that it qualifies as a Microcaster. To do so, the Microcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than the first date on which the Eligible Small Webcaster would be obligated under these Rates and Terms to make a royalty payment for each year it elects to be treated as a Microcaster. On any such election form, the Eligible Small Webcaster must, among other things, certify that it qualifies as a Microcaster; provide its prior year Gross Revenues, Third Party Participation Revenues and Aggregate Tuning Hours; and provide other information requested by SoundExchange for use in creating a royalty distribution proxy. Even if an Eligible Small Webcaster has once elected to be treated as a Microcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Microcaster.

(c) *Participation in Proceedings.* Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as an Eligible Small Webcaster that has participated in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination") or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the **Federal Register** at 74 FR 318–20 (Jan. 5, 2009)) shall not have the right to elect to be treated as an Eligible Small Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding and submits to SoundExchange a completed and signed election form within thirty (30) days after publication of these Rates and Terms in the **Federal Register**. An Eligible Small Webcaster that elects to be subject to these Rates and Terms for any one or more years agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during that year and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006–2015 period. Thus, once an Eligible Small Webcaster has elected to be subject to these Rates and Terms it shall not at any time (even if it is no longer eligible, or has no longer elected to be treated, as an Eligible Small Webcaster) directly or indirectly participate as a party, *amicus curiae* or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the Final Determination, any proceedings on remand from such an appeal, any proceeding before the Copyright Royalty Judges to determine royalty rates and terms applicable to the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2011–2015, any appeal of such proceeding, or any other related proceedings.

(d) *Compliance.* By electing Eligible Small Webcaster and/or Microcaster status, a transmitting entity represents that it is eligible therefor and in compliance with all requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as an Eligible Small Webcaster or Microcaster or that it has complied with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with the requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, an Eligible Small Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with those requirements.

3. Royalty Rates for Eligible Small Webcasters

For eligible nonsubscription transmissions made by an Eligible Small Webcaster during the period 2006–2015, except an electing Microcaster, the royalty rate shall be—

(1) On any transmissions not exceeding 5,000,000 Aggregate Tuning Hours per month (equivalent to approximately 6,945 average simultaneous listeners, listening for thirty consecutive days, 24 hours a day), the greater of (i) ten percent (10%) of the Eligible Small Webcaster's first $250,000 in Gross Revenues and twelve percent (12%) of any Gross Revenues in excess of $250,000 during the applicable year; or (ii) seven percent (7%) of the Eligible Small Webcaster's Expenses during the applicable year; and

(2) On any transmissions in excess of 5,000,000 Aggregate Tuning Hours per month, the commercial webcasting rates provided in the Final Determination (for the period 2006–2010) or the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for the period 2011–2015).

4. Minimum Annual Fees

(a) *In General.* For each year from 2006–2015, an Eligible Small Webcaster shall pay annual minimum fees as follows:

(1) $500 for electing Microcasters, which shall constitute the only royalty payable hereunder by an electing Microcaster, except that an electing Microcaster also shall pay a $100 annual fee (the "Proxy Fee") to SoundExchange for the reporting waiver discussed in Section 6(a), and the provisions of Section 5(d) shall apply;

(2) $2,000, for Eligible Small Webcasters other than electing Microcasters that had Gross Revenues during the prior year of not more than $50,000 and reasonably expect Gross Revenues of not more than $50,000 during the applicable year; or

(3) $5,000, for Eligible Small Webcasters that had Gross Revenues during the prior year of more than $50,000 or reasonably expect Gross Revenues to exceed $50,000 during the applicable year.

(b) The amounts specified in Section 4(a) shall be paid by January 31 of each year.

(c) All minimum fees (but not the Proxy Fee for the reporting waiver for Microcasters) shall be fully creditable toward royalties due for the year for which such amounts are paid, but not any other year.

5. Payments

(a) *Qualification to Make Current Payments as Eligible Small Webcaster.* If the Gross Revenues, plus the Third Party Participation Revenues and revenues from the operation of New Subscription Services, of a transmitting entity and its Affiliates have not exceeded $1,250,000 in any year, and the transmitting entity reasonably expects to be an Eligible Small Webcaster in a given year, the transmitting entity may make payments for that year on the assumption that it will be an Eligible Small Webcaster for that year for so long as that assumption is reasonable.

(b) *True-Up Between Gross Revenues and Expenses.* In making monthly payments, an Eligible Small Webcaster shall, at the time a payment is due, calculate its Gross Revenues and Expenses for the year through the end of the applicable month and pay the applicable

percentage of Gross Revenues or Expenses, as the case may be, for the year through the end of the applicable month, less any amounts previously paid for such year. For the purposes of illustration only, if an Eligible Small Webcaster has $100,000 in Gross Revenues and $2,000 in Expenses in Month 1, the monthly payment shall be $10,000 (10% of aggregate gross yearly revenue up to $250,000). In Month 2, if the Eligible Small Webcaster has $100,000 in Gross Revenue and $2,000 in Expenses, then the Eligible Small Webcaster shall pay $10,000 in monthly payments (10% of aggregate gross yearly revenue for the year up to $250,000 less the $10,000 paid in Month 1). In Month 3, if the Eligible Small Webcaster has $100,000 in Gross Revenue and $2,000 in Expenses, then the Eligible Small Webcaster shall pay $11,000 in monthly payments (10% of aggregate gross yearly revenue for the year up to $250,000 plus 12% of aggregate gross yearly revenue for the amount above $250,000, less prior payments).

(c) *Effect if Eligibility Condition is Exceeded.* Except as provided in Section 5(e), if a transmitting entity has made payments for any year based on the assumption that it will qualify as an Eligible Small Webcaster, but the actual Gross Revenues plus Third Party Participation Revenues and revenues from the operation of New Subscription Services in that year of the transmitting entity and its Affiliates exceed the Gross Revenue threshold provided in Section 8(e), then the transmitting entity shall receive a six (6) month grace period measured from the first month following the month in which such revenues exceed $1,250,000 (the "Grace Period"). During the Grace Period, the transmitting entity shall pay the rates as specified in Section 3(a). From and after the date the Grace Period has expired, the transmitting entity will pay the commercial webcasting rates provided in the Final Determination (for 2006–2010) or the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015), only for periods after the expiration of the Grace Period.

(d) *Effect if Microcaster Eligibility Condition is Exceeded.* Except as provided in Section 5(e), if a transmitting entity has made payments and not reported usage for any year based on the assumption that it will qualify as a Microcaster, but the actual Gross Revenues plus Third Party Participation Revenues, Expenses, or Aggregate Tuning Hours in that year of the transmitting entity and its Affiliates exceed a threshold provided in Section 8(h), then the transmitting entity's payments for that entire year shall retroactively be adjusted as provided in this Section 5(d). By no later than January 31 of the following year, the transmitting entity shall notify SoundExchange whether it elects to be treated for the entire year in which such threshold was exceeded as either an Eligible Small Webcaster but not a Microcaster, or as a transmitting entity fully subject to the Final Determination (for 2006–2010) or to the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015) (whichever of the foregoing it elects, the "Elected Status"). At the same time, the transmitting entity must pay all amounts that would have been due for that year if it had originally elected the Elected Status, less any royalties previously paid hereunder as a Microcaster for that year (but not less the Proxy Fee). The transmitting entity need not provide reports of use for that year, and SoundExchange may distribute the royalties paid by the transmitting entity for that year based on the proxy usage data applicable to Microcasters. For the year following the year in which such threshold was exceeded, the transmitting entity must comply with applicable requirements as either an Eligible Small Webcaster but not a Microcaster, or as a transmitting entity fully subject to the Final Determination (for 2006–2010) or to the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015).

(e) *True-Up for Certain Corporate Transactions.* If a transmitting entity that has at any time elected to be treated as an Eligible Small Webcaster under these Rates and Terms, and has not ceased to qualify as an Eligible Small Webcaster through growth in its business and thereafter paid full commercial webcasting rates for a period of at least twelve (12) full months (after any Grace Period applicable under Section 5(c)), becomes a party to or subject of any merger, sale of stock or all or substantially all of its assets, or other corporate restructuring, such that, upon the consummation of such transaction, the transmitting entity or its successor (including a purchaser of all or substantially all of its assets) does not qualify, or reasonably expect to qualify, as an Eligible Small Webcaster for the then-current year, then the transmitting entity or its successor shall, within thirty (30) days after the consummation of such transaction, pay to SoundExchange the difference between (1) the payment the transmitting entity would have been required to make under the commercial webcasting rates provided in the Final Determination (for 2006–2010) or under the then-applicable commercial webcasting rates under Sections 112(e) and 114 (for 2011–2015) for each year in which it elected to be treated as an Eligible Small Webcaster under these Rates and Terms, from January 1, 2006 through the date of such transaction, and (2) the royalty payments it made under these Rates and Terms for each such year. The burden of proof shall be on the transmitting entity or its successor to demonstrate its actual usage for purposes of determining the payment it would have been required to make under such commercial webcasting rates for each such year. If the transmitting entity has insufficient records to determine the payment it would have been required to make under such commercial webcasting rates for each such year, then such calculation shall be made on the basis of the assumption that it made transmissions of 5,000,000 Aggregate Tuning Hours per month, and 15.375 performances per each such Aggregate Tuning Hour, during the relevant period.

(f) *Remittance.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange as provided in Section 7(a). Eligible Small Webcasters shall not be entitled to a refund of any amounts paid to SoundExchange, but if an Eligible Small Webcaster makes an overpayment of royalties (other than payments of minimums) during a year, SoundExchange shall, at its discretion, either refund the overpayment or give the Eligible Small Webcaster a credit in the amount of its overpayment, which credit shall be available to be applied to its payments for the immediately following year only.

(g) *Ephemeral Recordings Royalty.* SoundExchange has discretion to allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as the majority of other webcasting royalties.

(h) *Past Periods.* Notwithstanding anything else in this Agreement, to the extent that an Eligible Small Webcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on February 28, 2009, any amounts payable under these Rates and Terms for eligible nonsubscription transmissions during such period for which payment has not previously been made shall be paid by no later than April 30, 2009, including late fees as provided in Section 5(i) from the original due date.

(i) *Late Fee.* An Eligible Small Webcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by SoundExchange in full compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange.

6. Notice and Recordkeeping

(a) *Microcasters.* SoundExchange believes that accurate census reporting by services is the best way for it to obtain data for making fair royalty distributions to copyright owners and performers, and for that reason, Section 6(b) generally requires census reporting by Eligible Small Webcasters. However, SoundExchange has observed a low level of compliance by the smallest webcasters with the payment and notice and recordkeeping requirements imposed by applicable regulations. Moreover, where SoundExchange has received reports of use from the smallest webcasters, it has had to devote levels of resources to processing those reports that are high relative to the usage and payment involved. While SoundExchange's ultimate goal is for all webcasters to provide census reporting, requiring census reporting by the smallest webcasters at this time may further reduce compliance and significantly increase distribution costs.

Accordingly, on a transitional basis for a limited time and for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these services, electing Microcasters shall not be required to provide reports of their use of

sound recordings for eligible nonsubscription transmissions and related ephemeral recordings. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Microcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Microcasters will pay to SoundExchange a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that offering this option to electing Microcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers. SoundExchange further hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of the smallest webcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. Microcasters should assume that, effective January 1, 2016, they will be required to report their actual usage in full compliance with then-applicable regulations. Microcasters are encouraged to begin to prepare to report their actual usage by that date, and if it is practicable for them to do so earlier, they may wish not to elect Microcaster status.

(b) *Reports to Be Provided by other Eligible Small Webcasters.* As a condition of these Rates and Terms, except as provided in Section 6(a), an Eligible Small Webcaster shall submit reports of use of sound recordings to SoundExchange covering the following for all of its eligible nonsubscription transmissions, on a channel by channel basis:

(1) The featured recording artist, group or orchestra;

(2) The sound recording title;

(3) The title of the retail album or other product (or, in the case of compilation albums created for commercial purposes, the name of the retail album upon which the track was originally released);

(4) The marketing label of the commercially available album or other product on which the sound recording is found;

(5) The International Standard Recording Code ("ISRC") embedded in the sound recording, if available;

(6) The copyright owner information provided in the copyright notice on the retail album or other product (*e.g.*, following the symbol (P) (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual track);

(7) The Aggregate Tuning Hours, on a monthly basis, for each channel provided by the Eligible Small Webcaster as computed by a recognized industry ratings service or as computed by the Eligible Small Webcaster from its server logs;

(8) The channel for each transmission of each sound recording; and

(9) The start date and time of each transmission of each sound recording.

If at any time during the period through December 31, 2015, Eligible Small Webcasters would be required under regulations applicable to the Section 112(e) or 114 statutory license to provide reports of use more extensive than provided in this Section 6(b), then any incremental information required by such regulations shall be provided under these Rates and Terms in addition to the information identified above.

(c) *Provision of Reports.* Reports of use described in Section 6(b) shall be provided at the same time royalty payments are due under Section 7(a).

(d) *Server Logs.* To the extent not already required by the current regulations set forth in 37 CFR Part 380, all Eligible Small Webcasters shall retain for a period of at least four (4) years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for an Eligible Small Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Eligible Small Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least four years and/or that such server logs be provided to, and maintained by, the Eligible Small Webcaster. SoundExchange shall have access to the same pursuant to applicable regulations for the verification of statutory royalty payments (presently 37 CFR 380.6).

7. Additional Provisions

(a) *Monthly Obligations.* All Eligible Small Webcasters except electing Microcasters must make monthly payments, provide statements of account, and submit reports of use as described in Section 6 for each month on the forty-fifth (45th) day following the month in which the transmissions subject to the payments, statements of account, and reports of use were made.

(b) *Proof of Eligibility.* At all times, the burden of proof shall be on the Eligible Small Webcaster to demonstrate eligibility for the Rates and Terms set forth herein and for Microcaster status, and at all times the obligation shall be on the Eligible Small Webcaster to maintain records sufficient to determine eligibility. Failure to retain sufficient records to determine eligibility shall constitute a violation of these Rates and Terms and shall render a transmitting entity ineligible for the rates and terms set forth herein. An Eligible Small Webcaster that elects to be governed by the rates and terms set forth herein shall make available to SoundExchange, within thirty (30) days after SoundExchange's written request at any time during the three (3) years following a period during which it is to be treated as an Eligible Small Webcaster for purposes of these Rates and Terms, sufficient evidence to support its eligibility as an Eligible Small Webcaster and/or Microcaster during that period, including but not limited to an accounting of all Affiliate and Third Party Participation Revenue, and Aggregate Tuning Hours on a monthly basis. Any proof of eligibility provided hereunder shall be provided with a certification signed by the Eligible Small Webcaster if a natural person, or by an officer or partner of the Eligible Small Webcaster if the Eligible Small Webcaster is a corporation or partnership, stating, under penalty of perjury, that the information provided is accurate and the person signing is authorized to act on behalf of the Eligible Small Webcaster.

(c) *Default.* An Eligible Small Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Eligible Small Webcaster that, unless the breach is remedied within thirty days from the date of notice and not repeated, the Eligible Small Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms will be automatically terminated. Such termination renders any public performances and ephemeral reproductions as to which the breach relates actionable as acts of infringement under 17 U.S.C. 501 and fully subject to the remedies provided by 17 U.S.C. 502–506.

(d) *Applicable Regulations.* To the extent not inconsistent with the terms herein, use of sound recordings by Eligible Small Webcasters shall be governed by, and Eligible Small Webcasters shall comply with, applicable regulations, including 37 CFR Part 380. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. Eligible Small Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

(e) *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and Eligible Small Webcasters consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

(f) *Rights Cumulative.* The remedies provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent

with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. Neither these Rates and Terms nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

(g) *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and an Eligible Small Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and an Eligible Small Webcaster with respect to the subject matter hereof.

8. Definitions

As used in these Rates and Terms, the following terms shall have the following meanings:

(a) An *"Affiliate"* of a transmitting entity is a person or entity that directly, or indirectly through one or more intermediaries—

(1) Has securities or other ownership interests representing more than 50 percent of such person's or entity's voting interests beneficially owned by—

(A) Such transmitting entity; or

(B) A person or entity beneficially owning securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity;

(2) Beneficially owns securities or other ownership interests representing more than 50 percent of the voting interests of the transmitting entity; or

(3) Otherwise Controls, is Controlled by, or is under common Control with the transmitting entity.

(b) The term *"Aggregate Tuning Hours"* has the meaning given that term in 37 CFR § 380.2(a), as published in the Final Determination.

(c) A *"Beneficial Owner"* of a security or other ownership interest is any person or entity who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, has or shares voting power with respect to such security or other ownership interest.

(d) The term *"Control"* means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or entity, whether through the ownership of voting securities, by contract or otherwise.

(e) An *"Eligible Small Webcaster"* is a person or entity that (i) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make eligible nonsubscription transmissions over the Internet and related ephemeral recordings; (ii) complies with all provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i); and (iv) in any calendar year in which it is to be considered an Eligible Small Webcaster has, together with its Affiliates, annual Gross Revenues plus Third Party Participation Revenues and revenues from the operation of New Subscription Services of not more than $1,250,000. In determining qualification under this Section 8(e), a transmitting entity shall exclude—

(1) Income of an Affiliate that is a natural person, other than income such natural person derives from another Affiliate of such natural person that is either a media or entertainment related business that provides audio or other entertainment programming, or a business that primarily operates an Internet or wireless service; and

(2) Gross Revenues of any Affiliate that is not engaged in a media or entertainment related business that provides audio or other entertainment programming, and is not engaged in a business that primarily operates an Internet or wireless service, if the only reason such Affiliate is Affiliated with the transmitting entity is that (i) it is under common Control of the same natural person or (ii) both are beneficially owned by the same natural person.

In the case of a person or entity that offers both eligible nonsubscription transmissions (as defined in 17 U.S.C. 114(j)(6)) and a New Subscription Service, these Rates and Terms apply only to the Eligible Small Webcaster's eligible nonsubscription transmissions and not the New Subscription Service.

(f) The term *"Expenses"*—

(1) Means all costs incurred (whether actually paid or not) by an Eligible Small Webcaster, except that capital costs shall be treated as Expenses allocable to a period only to the extent of charges for amortization or depreciation of such costs during such period as are properly allocated to such period in accordance with United States generally accepted accounting principles ("GAAP");

(2) Includes the fair market value of all goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property) provided by an Eligible Small Webcaster to any third party in lieu of a cash payment and the fair market value of any goods or services purchased for or provided to an Eligible Small Webcaster by an Affiliate of such webcaster; and

(3) Shall not include—

(A) The imputed value of personal services rendered by up to 5 natural persons who are, directly or indirectly, owners of the Eligible Small Webcaster, and for which no compensation has been paid;

(B) The imputed value of occupancy of residential property for which no Federal income tax deduction is claimed as a business expense;

(C) Costs of purchasing phonorecords of sound recordings used in the Eligible Small Webcaster's service;

(D) Royalties paid for the public performance of sound recordings; or

(E) The reasonable costs of collecting overdue accounts receivable, provided that the reasonable costs of collecting any single overdue account receivable may not exceed the actual account receivable.

(g) The term *"Gross Revenues"*—(1) Means all revenue of any kind earned by a person or entity, less—

(A) Revenue from sales of phonorecords and digital phonorecord deliveries of sound recordings;

(B) The person or entity's actual costs of other products and services actually sold through a service that makes eligible nonsubscription transmissions, and related sales and use taxes imposed on such transactions, costs of shipping such products, allowance for bad debts, and credit card and similar fees paid to unrelated third parties;

(C) Revenue from the operation of a New Subscription Service for which royalties are paid in accordance with provisions of 17 U.S.C. 112 and 114; and

(D) Revenue from the sale of assets in connection with the sale of all or substantially all of the assets of such person's or entity's business, or from the sale of capital assets; and

(2) Includes—

(A) All cash or cash equivalents;

(B) The fair market value of goods, services, or other non-cash consideration (including real, personal, tangible, and intangible property);

(C) In-kind and cash donations and other gifts (but not capital contributions made in exchange for an equity interest in the recipient); and

(D) Amounts earned by such person or entity but paid to an Affiliate of such person or entity in lieu of payment to such person or entity.

Gross revenues shall be calculated in accordance with U.S. Generally Accepted Accounting Principles (GAAP), except that a transmitting entity that computes Federal taxable income on the basis of the cash receipts and disbursements method of accounting for any taxable year may compute its gross receipts for any period included in such taxable year on the same basis.

(h) A *"Microcaster"* is an Eligible Small Webcaster that, together with its Affiliates, in any calendar year in which it is to be considered a Microcaster, meets the following additional eligibility criteria: (i) Transmits sound recordings only by means of eligible nonsubscription transmissions (as defined in 17 U.S.C. 114(j)(6)); (ii) had annual Gross Revenues plus Third Party Participation Revenues during the prior year of not more than $5,000 and reasonably expects Gross Revenues plus Third Party Participation Revenues during the applicable year of not more than $5,000; (iii) has Expenses during the prior year of not more than $10,000 and reasonably expects Expenses during the applicable year of not more than $10,000; and (iv) during the prior year did not make eligible nonsubscription transmissions exceeding 18,067 Aggregate Tuning Hours, and during the applicable year reasonably does not expect to make eligible nonsubscription transmissions exceeding 18,067 Aggregate Tuning Hours.

(i) The term *"New Subscription Service"* has the meaning given that term in 17 U.S.C. 114(j)(8).

(j) The *"Third Party Participation Revenues"* of a transmitting entity are revenues of any kind earned by a person or entity, other than the transmitting entity, including those:

(1) That relate to the public performance of sound recordings and are subject to an economic arrangement in which the transmitting entity receives anything of value; or

(2) That are earned by such person or entity from the sale of advertising of any kind in connection with the transmitting entity's eligible nonsubscription transmissions.

By way of example only, a transmitting entity's Third Party Participation Revenues would include revenues earned by the transmitting entity's proprietor, a marketing partner of the transmitting entity, or an aggregator through which the transmitting entity's transmissions are available, by virtue of the transmitting entity's transmissions.

[FR Doc. E9–4439 Filed 3–2–09; 8:45 am]
BILLING CODE 1410–30–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection, Financial Disclosure Report, Standard Form 714, which is required as a condition of access to specifically designated classified information along with a favorably adjudicated personnel security background investigation or reinvestigation that results in the granting or updating of a security clearance. Additionally, NARA proposes to make changes to the Standard Form 714 and the instructions to the form. Specific proposed changes will be provided upon request to NARA at the addresses provided below. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before May 4, 2009 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd., College Park, MD 20740–6001; or faxed to 301–713–7409; or electronically mailed to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–713–7409.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways, including the use of information technology, to minimize the burden of the collection of information on all respondents; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Financial Disclosure Report.

OMB number: 3095–0058.

Agency form number: Standard Form 714.

Type of review: Regular.

Affected public: Business or other for-profit.

Estimated number of respondents: 25,897.

Estimated time per response: 2 hours.

Frequency of response: On occasion.

Estimated total annual burden hours: 51,794 hours.

Abstract: Executive Order 12958, as amended, "Classified National Security Information" authorizes the Information Security Oversight Office to develop standard forms that promote the implementation of the Government's security classification program. These forms promote consistency and uniformity in the protection of classified information.

The Financial Disclosure Report contains information that is used to assist in making eligibility determinations for access to specifically designated classified information pursuant to Executive Order 12968, "Access to Classified Information," by appropriately trained adjudicative personnel. The data may later be used as part of a review process to evaluate continued eligibility for access to such specifically designated classified information or as evidence in legal proceedings.

The Financial Disclosure Report helps law enforcement entities obtain pertinent information in the preliminary stages of potential espionage and counter terrorism cases.

Dated: February 26, 2009.

Martha Morphy,

Assistant Archivist for Information Services.

[FR Doc. E9–4502 Filed 3–2–09; 8:45 am]
BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extensions of two currently approved information collections. The first is a survey of Customer Satisfaction at the National Personnel Records Center (Military Personnel Records [MPR] facility) of the National Archives and Records Administration. The second is voluntary survey of museum visitors at each Presidential library. The information provides feedback about our visitors' experiences at the libraries. The public is invited to comment on the proposed information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before May 4, 2009 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; faxed to 301–713–7409; or electronically mailed to *tamee.fechhelm@nara.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694; fax number 301–713–7409; or *tamee.fechhelm@nara.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13), NARA invites the

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:	
Digital Performance in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Webcasting III

JOINT MOTION TO ADOPT PARTIAL SETTLEMENT

SoundExchange, Inc. ("SoundExchange") and the National Association of Broadcasters ("NAB") (collectively the "Parties") have reached a partial settlement of the above-captioned proceeding (the "Proceeding") for certain internet transmissions by commercial broadcasters. The Parties are pleased to submit the proposed regulatory language attached as Exhibit A (the "Settlement") for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112 and 114 of the Copyright Act for "Broadcast Retransmissions" (internet retransmissions of the over-the-air signals of commercial broadcasters) and "Broadcaster Webcasts" (other eligible nonsubscription transmissions over the internet by commercial broadcasters), as more specifically defined in the Settlement.

I. The Parties

SoundExchange and NAB are both participants in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both sound recording copyright owners and performers. The Copyright Royalty Judges have designated SoundExchange as the collective to receive and distribute

royalties under Sections 112 and 114 on behalf of all copyright owners and performers, and SoundExchange currently maintains more than 35,000 artist accounts and more than 4,000 copyright owner accounts.

NAB is a trade association whose members include more than 8,300 local radio and television stations and also broadcast networks. Many of NAB's radio broadcaster members make internet transmissions subject to licensing under Sections 112 and 114.

II. Nature of the Settlement

Under the authorization granted in the Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008) (to be codified at 17 U.S.C. § 114(f)(5)), the Parties concluded an agreement concerning royalty rates and terms for Broadcaster Webcasts and Broadcast Retransmissions during the period 2006-2015. That agreement was published in the *Federal Register* on March 3, 2009. Notification of Agreements under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293 (Mar. 3, 2009). Under the Webcaster Settlement Act, an agreement is "available, as an option, to any commercial webcaster or noncommercial webcaster meeting the eligibility conditions of such agreement." 17 U.S.C. § 114(f)(5)(B).

Broadly speaking, the entities eligible to elect to be covered by the agreement, as contemplated by the Webcaster Settlement Act, are commercial broadcasters licensed under Sections 112 and 114. *See* Agreed Rates and Terms for Broadcasters, §§ 1.2(a), 2.1, 2.2, 74 Fed. Reg. at 9299. Over 380 commercial broadcasters have elected to take advantage of this agreement in lieu of the rates to be determined in this Proceeding. These include such major broadcasters as Bonneville International, CBS Radio, Clear Channel Communications, Entercom Communications and Greater Media, which are among the

larger payors of webcasting royalties and have withdrawn as participants in this proceeding. However, it includes many smaller broadcasters as well.

The Settlement implements the royalty rates and terms of the Parties' Webcaster Settlement Act agreement for the period 2011-2015, within the context of regulations based on the Copyright Royalty Judges' current webcasting regulations at 37 C.F.R. Part 380. Thus, the Settlement specifies statutory rates and terms for Broadcast Retransmissions and Broadcaster Webcasts by Broadcasters. Adoption of the Settlement would bring into alignment the statutory rates and terms and Webcaster Settlement Act rates and terms for commercial broadcasters for the period 2011-2015.

III. Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority "[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding." Such an agreement may serve as the basis of proposed regulations if other interested parties who "would be bound by the terms, rates or other determination" set by the agreement are afforded "an opportunity to comment on the agreement," *id.* § 801(b)(7)(A)(i), and provided, in the event a participant to the proceeding raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement "provide a reasonable basis for setting statutory terms or rates." *Id.* § 801(b)(7)(A)(ii).

Because the rates and terms provided by the Settlement have already been embraced by at over 380 commercial broadcasters comprising thousands of individual stations in the context of the Webcaster Settlement Act agreement, the Settlement

manifestly provides a reasonable basis for setting statutory terms and rates. Accordingly, the Parties ask that the Judges publish the Settlement for notice and comment, and in due course adopt the Settlement in its entirety as the statutory rates and terms for Broadcaster Webcasts and Broadcast Retransmissions for the period 2011-2015.

Respectfully submitted,

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June 1, 2009

EXHIBIT A – PROPOSED REGULATIONS

PART 380--RATES AND TERMS FOR BROADCASTERS MAKING CERTAIN ELIGIBLE TRANSMISSIONS OF SOUND RECORDINGS

Sec.
380.1 General.
380.2 Definitions.
380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.
380.4 Terms for making payment of royalty fees and statements of account.
380.5 Confidential information.
380.6 Verification of royalty payments.
380.7 Verification of royalty distributions.
380.8 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

[Note: The section numbers used herein were employed for convenience of reference. The provisions hereof could be included in a separate subpart or otherwise be renumbered depending upon what other rates and terms also need to be included in Part 380 at the conclusion of the Proceeding.]

§ 380.1 General.

(a) Scope. This part 380 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions made by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Broadcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2011, through December 31, 2015.

(b) Legal compliance. Broadcasters relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this part, and any other applicable regulations not inconsistent with the rates and terms set forth herein.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and digital audio services shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

§ 380.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) Aggregate Tuning Hours means the total hours of programming that the Broadcaster has transmitted during the relevant period to all listeners within the United

States from any channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions.

(b) Broadcaster means an entity that (i) has a substantial business owning and operating one or more terrestrial AM or FM radio stations that are licensed as such by the Federal Communications Commission; (ii) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (iii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; and (iv) is not a noncommercial webcaster as defined in 17 U.S.C. § 114(f)(5)(E)(i).

(c) Broadcaster Webcasts mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are not Broadcast Retransmissions.

(d) Broadcast Retransmissions mean eligible nonsubscription transmissions made by a Broadcaster over the internet that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Broadcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming that does not require a license under United States copyright law or that is transmitted on an internet-only side channel.

(e) Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2011-2015 license period, the Collective is SoundExchange, Inc.

(f) Copyright Owners are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

(g) Eligible Transmission shall mean either a Broadcaster Webcast or a Broadcast Retransmission.

(h) Ephemeral Recording is a phonorecord created for the purpose of facilitating an Eligible Transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f), and subject to the limitations specified in 17 U.S.C. 112(e).

(i) Performance is each instance in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission (e.g., the delivery of any portion of a single track from a compact disc to one listener) but excluding the following:

(1) A performance of a sound recording that does not require a license (e.g., a sound recording that is not copyrighted);

(2) A performance of a sound recording for which the Broadcaster has previously obtained a license from the Copyright Owner of such sound recording; and

(3) An incidental performance that both:

(i) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and

(ii) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(j) Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(k) Qualified Auditor is a Certified Public Accountant.

(l) Small Broadcaster is a Broadcaster that, for any of its channels and stations (determined as provided in § 380.3(c)) over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits Broadcaster Webcasts in the aggregate, in any calendar year in which it is to be considered a Small Broadcaster, meets the following additional eligibility criteria: (i) during the prior year it made Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; and (ii) during the applicable year it reasonably expects to make Eligible Transmissions totaling less than 27,777 Aggregate Tuning Hours; provided that, one time during the period 2011-2015, a Broadcaster that qualified as a Small Broadcaster under the foregoing definition as of January 31 of one year, elected Small Broadcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 27,777 aggregate tuning hours during that year, may choose to be treated as a Small Broadcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that that it will not make Eligible Transmissions exceeding 27,777 aggregate tuning hours during that following year. As to channels or stations over which a Broadcaster transmits Broadcast Retransmissions, the Broadcaster may elect Small Broadcaster status only with respect to any of its channels or stations that meet all of the foregoing criteria.

§ 380.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) Royalty Rates. Royalties for Eligible Transmissions made pursuant to 17 U.S.C. § 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. § 112(e), shall, except as provided in § 380.4(g)(3), be payable on a per-performance basis, as follows:

Year	Rate per Performance
2011	$0.0017
2012	$0.0020
2013	$0.0022
2014	$0.0023
2015	$0.0025

(b) Ephemeral Royalty. The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Broadcaster during this license period and used solely by the Broadcaster to facilitate transmissions for which it pays royalties as and when provided in this section is deemed to be included within such royalty payments and to equal the percentage of such royalty payments determined by the Copyright Royalty Judges for other webcasting, provided that such allocation shall not, by virtue of the

parties' agreement to propose this § 380.3(b) to the Copyright Royalty Judges, be considered precedent in any judicial, administrative, or other proceeding.

(c) Minimum fee. Each Broadcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2011-2015 during which the Broadcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Broadcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations). For the purpose of this part, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum, except that identical streams for simulcast stations will be treated as a single stream if the streams are available at a single Uniform Resource Locator (URL) and performances from all such stations are aggregated for purposes of determining the number of payable performances hereunder. Upon payment of the minimum fee, the Broadcaster will receive a credit in the amount of the minimum fee against any additional royalties payable for the same calendar year for the same channel or station. In addition, an electing Small Broadcaster also shall pay a $100 annual fee (the "Proxy Fee") to the Collective for the reporting waiver discussed in § 380.4(g)(2).

§ 380.4 Terms for making payment of royalty fees and statements of account.

(a) Payment to the Collective. A Broadcaster shall make the royalty payments due under § 380.3 to the Collective.

(b) Designation of the Collective.

(1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Broadcasters due under § 380.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Board designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments and reporting. Broadcasters must make monthly payments where required by § 380.3, and provide statements of account and reports of use, for each month on the 45th day following the month in which the Eligible Transmissions subject to

the payments, statements of account, and reports of use were made. All monthly payments shall be rounded to the nearest cent.

(d) Minimum payments. A Broadcaster shall make any minimum payment due under § 380.3(b) by January 31 of the applicable calendar year, except that payment by a Broadcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45th day after the end of the month in which the Broadcaster commences to do so.

(e) Late fees. A Broadcaster shall pay a late fee for each instance in which any payment, any statement of account or any report of use is not received by the Collective in compliance with applicable regulations by the due date. The amount of the late fee shall be 1.5% of a late payment, or 1.5% of the payment associated with a late statement of account or report of use, per month, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by the Collective, provided that, in the case of a timely provided but noncompliant statement of account or report of use, the Collective has notified the Broadcaster within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(f) Statements of account. Any payment due under § 380.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment;

(2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address (if any) and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Broadcaster or a duly authorized agent of the owner, if the Broadcaster is not a partnership or corporation;

(ii) A partner or delegee, if the Broadcaster is a partnership; or

(iii) An officer of the corporation, if the Broadcaster is a corporation.

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Broadcaster is a partnership or corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Broadcaster, or officer or partner, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence.

(g) Reporting by Broadcasters in General. (1) Broadcasters other than electing Small Broadcasters covered by subsection (g)(2) shall submit reports of use on a per-performance basis in compliance with the regulations set forth in 37 C.F.R. Part 370, except that the following provisions shall apply notwithstanding the provisions of such Part 370 from time to time in effect:

(i) Broadcasters may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hour basis as provided in subsection (g)(3).

(ii) Broadcasters shall submit reports of use to the Collective on a monthly basis.

(iii) As provided in § 380.4(d), Broadcasters shall submit reports of use by no later than the 45th day following the last day of the month to which they pertain.

(iv) Except as provided in subsection (g)(3), Broadcasters shall submit reports of use to the Collective on a census reporting basis (i.e., reports of use shall include every sound recording performed in the relevant month and the number of performances thereof).

(v) Broadcasters shall either submit a separate report of use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis;

(vi) Broadcasters shall transmit each report of use in a file the name of which includes (i) the name of the Broadcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single station only, the call letters of the station.

(vii) Broadcasters shall submit reports of use with headers, as presently described in 37 C.F.R. § 370.3(d)(7).

(viii) Broadcasters shall submit a separate statement of account corresponding to each of their reports of use, transmitted in a file the name of which includes (A) the name of the Broadcaster, exactly as it appears on its notice of use, and (B) if the statement covers a single station only, the call letters of the station.

(2) On a transitional basis for a limited time in light of the unique business and operational circumstances currently existing with respect to Small Broadcasters and with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations. Small Broadcasters that have made an election pursuant to subsection (h) for the relevant year shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related Ephemeral Recordings. The immediately preceding sentence applies even if the Small Broadcaster actually makes Eligible Transmissions for the year exceeding 27,777 Aggregate Tuning Hours, so long as it qualified as a Small Broadcaster at the time of its election for that year. In addition to minimum royalties hereunder, electing Small Broadcasters will pay to the Collective a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data.

(3) Broadcasters generally reporting pursuant to subsection (g)(1) may pay for, and report usage in, a percentage of their programming hours on an Aggregate Tuning Hours basis, if (a) census reporting is not reasonably practical for the programming during those hours, and (b) if the total number of hours on a single report of use, provided pursuant to subsection (g)(1), for which this type of reporting is used is below the maximum percentage set forth below for the relevant year:

Year	Maximum Percentage
2011	16%
2012	14%
2013	12%
2014	10%
2015	8%

To the extent that a Broadcaster chooses to report and pay for usage on an Aggregate Tuning Hours basis pursuant to this subsection, the Broadcaster shall (i) report and pay based on the assumption that the number of sound recordings performed during the relevant programming hours is 12 per hour; (ii) pay royalties (or recoup minimum fees) at the per-performance rates provided in § 380.3 on the basis of clause (i) above; (iii) include Aggregate Tuning Hours in reports of use; and (iv) include in reports of use complete playlist information for usage reported on the basis of Aggregate Tuning Hours.

(h) Election of Small Broadcaster Status. To be eligible for the reporting waiver for Small Broadcasters with respect to any particular channel in a given year, a Broadcaster must satisfy the definition set forth in § 380.2 and must submit to the Collective a completed and signed election form (available on the SoundExchange Web site at http://www.soundexchange.com) by no later than January 31 of the applicable year. Even if a Broadcaster has once elected to be treated as a Small Broadcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Small Broadcaster.

(i) Distribution of royalties.

(1) The Collective shall promptly distribute royalties received from Broadcasters to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify and pay the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Broadcaster equally based upon the information provided under the report of use requirements for Broadcasters contained in § 370.3 and this part, except that in the case of electing Small Broadcasters, the Collective shall distribute royalties based on proxy usage data in accordance with a methodology adopted by the Collective's Board of Directors.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (g)(1) of this section within 3 years from the date of payment by a Broadcaster, such distribution may first be applied to the costs directly attributable to the administration of that distribution. The foregoing shall apply notwithstanding the common law or statutes of any State.

(j) Retention of records. Books and records of a Broadcaster and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

(k) Non-Waiver. The Collective's acceptance of an election, payment or reporting does not give or imply any acknowledgment that a transmitting entity qualifies as a Broadcaster or Small Broadcaster or is in compliance with the requirements of the statutory licenses under 17 U.S.C. 112(e) and 114, and shall not be used as evidence that it so qualifies or is in compliance. The Collective and Copyright Owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these rates and terms.

§ 380.5 Confidential information.

(a) Definition. For purposes of this part, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Broadcaster submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Broadcaster's statement of account pursuant to § 380.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 380.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114(f) by the Broadcaster whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§ 380.6 Verification of royalty payments.

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Broadcaster.

(b) Frequency of verification. The Collective may conduct a single audit of a Broadcaster, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Board a notice of intent to audit a particular Broadcaster, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Broadcaster to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) Acquisition and retention of report. The Broadcaster shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Broadcaster being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Broadcaster reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Broadcaster shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.7 Verification of royalty distributions.

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Board a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit;
Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§ 380.8 Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

CERTIFICATE OF SERVICE

I, Albert Peterson, do hereby certify that copies of the foregoing filing were sent via overnight mail this 1st day of June, 2009 to the following:

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Albert Peterson

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, DC

In the Matter of:	)	Docket No. 2009-1 CRB Webcasting III
Digital Performance Right In Sound Recordings and Ephemeral Recordings	)	

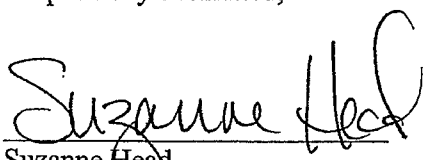
NATIONAL ASSOCIATION OF BROADCASTERS' PETITION TO PARTICIPATE

Pursuant to 17 U.S.C. § 803(b)(1)(B) and 74 Fed. Reg. 318, the National Association of Broadcasters ("NAB") hereby petitions to participate in the above-captioned proceeding to adjust the rates and terms for 2011-2015 for eligible nonsubscription services to make certain public performances by digital audio transmission of sound recordings under 17 U.S.C. § 114(f)(2) and to make ephemeral recordings in furtherance of those performances under 17 U.S.C. § 112(e).

NAB is a nonprofit trade association that promotes and protects the public policy and business interests of local radio and television broadcasters throughout the United States. NAB advocates on the behalf of over 8,300 radio and television stations and has a direct and vital interest in this proceeding because many of its member companies make public performances of sound recordings by digital transmission and ephemeral recordings in furtherance thereof that will be subject to the rates and terms established in this proceeding.

The requisite $150 filing fee is enclosed herewith.

Respectfully submitted,



Suzanne Head
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February 4, 2009

LIBRARY OF CONGRESS

Copyright Office

Notification of Agreements Under the Webcaster Settlement Act of 2009

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of agreements.

SUMMARY: The Copyright Office is publishing four agreements which set rates and terms for the reproduction and performance of sound recordings made by certain webcasters under two statutory licenses. Webcasters who meet the eligibility requirements may choose to operate under the statutory licenses in accordance with the rates and terms set forth in the agreements published herein rather than the rates and terms of any determination by the Copyright Royalty Judges.

FOR FURTHER INFORMATION CONTACT: Stephen Ruwe, Attorney Advisor, or Tanya M. Sandros, Deputy General Counsel, Copyright Office, GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366. See the final paragraph of the **SUPPLEMENTARY INFORMATION** for information on where to direct questions regarding the rates and terms set forth in the agreement.

SUPPLEMENTARY INFORMATION: On June 30, 2009, President Obama signed into law the Webcaster Settlement Act of 2009 ("WSA"), Public Law 111–36, which amends section 114 of the Copyright Act, title 17 of the United States Code, as it relates to webcasters. Section 114(f)(5) as amended by the WSA allows SoundExchange, the Receiving Agent designated by the Librarian of Congress in his June 20, 2002, order for collecting royalty payments made by eligible nonsubscription transmission services under the section 112 and section 114 statutory licenses, *see* 67 FR 45239 (July 8, 2002), to enter into agreements on behalf of all copyright owners and performers to set rates, terms and conditions for webcasters operating under the section 112 and section 114 statutory licenses for a period of not more than 11 years beginning on January 1, 2005. The authority to enter into such settlement agreements expired at 11:59 p.m. Eastern time on July 30, 2009, the 30th day after the enactment of the WSA.

Unless otherwise agreed to by the parties, the rates and terms set forth in the agreement apply only to the time periods specified in the agreement and have no precedential value in any proceeding concerned with the setting of rates and terms for the public performance or reproduction in ephemeral phonorecords. To make this point clear, Congress included language expressly addressing the precedential value of agreements made under the WSA. Specifically, section 114(f)(5)(C), states that: "Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral recordings or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice and recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that the receiving agent and a webcaster that are party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection." 17 U.S.C. 114(f)(5)(C) (2009).[1]

On July 30, 2009, SoundExchange notified the Copyright Office that it had negotiated four separate agreements for the reproduction and performance of sound recordings by certain webcasters under the section 112 and section 114 statutory licenses. Thus, in accordance with the requirement set forth in section 114(f)(5)(B), the Copyright Office is publishing the submitted agreements, as Appendix A (Agreement with Sirius XM Radio Inc.); Appendix B (Agreement with College Broadcasters, Inc.); Appendix C (Agreement with the Corporation for Public Broadcasting); and Appendix D (Agreement with Northwestern College), thereby making the rates and terms in the agreements available to any webcasters meeting the respective eligibility conditions of the agreements as an alternative to the rates and terms of any determination by the Copyright Royalty Judges.

The Copyright Office has no responsibility for administering the rates and terms of the agreements beyond the publication of this notice. For this reason, questions regarding the rates and terms set forth in the agreements should be directed to SoundExchange (for contact information, *see http://www.soundexchange.com*).

Dated: August 5, 2009.

Marybeth Peters,

Register of Copyrights.

Note: The following Appendix Will Not Be Codified in the Code of Federal Regulations.

Appendix A—Agreed Rates and Terms for Webcasts by Commercial Webcasters

Article 1—Definitions

1.1 *General.* In general, words used in the rates and terms set forth herein (the "Rates and Terms") and defined in 17 U.S.C. 112(e) or 114 or 37 CFR Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) "Commercial Webcaster" shall mean a webcaster as defined in 17 U.S.C. 114(f)(5)(E)(iii) that (i) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is not a Broadcaster (as defined in Section 1.2(a) of the agreement published in the **Federal Register** on March 3, 2009 at 74 FR 9299); (iv) is not a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i); and (v) has not elected to be subject to any other rates and terms adopted pursuant to the Webcaster Settlement Act of 2008 or the Webcaster Settlement Act of 2009.

(b) "*Eligible Transmission*" shall mean an eligible nonsubscription transmission, or a transmission through a new subscription service, made by a Commercial Webcaster over the Internet, that is in full compliance with the eligibility and other requirements of Sections 112(e) and 114 of the Copyright Act and their implementing regulations, except as expressly modified in these Rates and Terms, and of a type otherwise subject to the payment of royalties under 37 CFR Part 380.

(c) "*SoundExchange*" shall mean SoundExchange, Inc. and shall include its successors and assigns.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2009

2.1 *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of

[1] Appendix A (Section 5.3) & Appendix B (Section 6.2) expressly authorize the submission of the relevant agreements in a proceeding under 17 U.S.C. 114(f).

2009, and subject to the provisions set forth below, Commercial Webcasters may elect to be subject to these Rates and Terms in their entirety, with respect to such Commercial Webcasters' Eligible Transmissions and related ephemeral recordings, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Commercial Webcaster must comply with otherwise applicable rates and terms.

2.2 *Election Process in General.* To elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015, a Commercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by the later of (i) 15 days after publication of these Rates and Terms in the **Federal Register**; or (ii) in the case of a Commercial Webcaster that is not making Eligible Transmissions as of the publication of these Rates and Terms in the **Federal Register** but begins doing so at a later time, 30 days after the Commercial Webcaster begins making such Eligible Transmissions. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Commercial Webcaster that is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination"), any proceedings on remand from such appeal, Docket No. 2009–1 CRB Webcasting III, as noticed in the **Federal Register** at 74 FR 318–19 (Jan. 5, 2009), or any other proceedings to determine royalty rates and terms for Eligible Transmissions (as defined in Section 1.2(b)) or related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 shall not have the right to elect to be treated as a Commercial Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceedings prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2.

2.3 *Representation of Compliance and Non-waiver.* By electing to operate pursuant to these Rates and Terms, an entity represents and warrants that it qualifies as a Commercial Webcaster. By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Commercial Webcaster or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is in full compliance with applicable requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a Commercial Webcaster agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements.

Article 3—Scope

3.1 *In General.* Commercial Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. 112(e) and 114 and their implementing regulations, in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, for all of the period beginning on January 1, 2009, and ending on December 31, 2015.

3.2 *Applicability to All Eligible Services Operated by or for a Commercial Webcaster.* If a Commercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Commercial Webcaster.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Commercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. 112(e) and 114.

Article 4—Royalties

4.1 *Minimum Fees.* Each Commercial Webcaster will pay an annual, nonrefundable minimum fee of $500 for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year or part of a calendar year during 2009–2015 during which the Commercial Webcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114, provided that a Commercial Webcaster shall not be required to pay more than $50,000 in minimum fees in the aggregate (for 100 or more channels or stations) in any one year. Upon payment of the minimum fee, the Commercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable for the same calendar year for the same channel or station.

4.2 *Royalty Rates.* Royalties for Eligible Transmissions made pursuant to 17 U.S.C. 114, and the making of related ephemeral recordings pursuant to 17 U.S.C. 112(e), shall be payable on a per-performance basis, as follows:

Year	Rate per performance
2009	$0.0016
2010	0.0017
2011	0.0018
2012	0.0020
2013	0.0021
2014	0.0022
2015	0.0024

4.3 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Commercial Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015.

4.4 *Payment.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange. Minimum fees shall be paid by January 31 of each year. Once a Commercial Webcaster's royalty obligation under Section 4.2 with respect to a channel or station for a year exceeds the minimum fee it has paid for that channel or station and year, thereby recouping the credit provided by Section 4.1, the Commercial Webcaster shall make monthly payments at the per-performance rates provided in Section 4.2 beginning with the month in which the minimum fee first was recouped.

4.5 *Monthly Obligations.* Commercial Webcasters must make monthly payments where required by Section 4.4 and provide statements of account and reports of use, for each month on the 45th day following the end of the month in which the Eligible Transmissions subject to the payments, statements of account, and reports of use were made.

4.6 *Past Periods.* Notwithstanding Sections 4.4 and 4.5, a Commercial Webcaster's first monthly payment after

electing to be subject to these Rates and Terms shall be adjusted to reflect any differences between (i) the amounts payable under these Rates and Terms for all of 2009 to the end of the month for which the payment is made and (ii) the Commercial Webcaster's previous payments for all of 2009 to the end of the month for which the payment is made. Late fees under 37 CFR 380.4(e) shall apply to any payment previously due and not made on time, or to any late payment hereunder.

Article 5—Additional Provisions

5.1 *Applicable Regulations.* To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms.

5.2 *Participation in Specified Proceedings.* A Commercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2009–2015 period and in lieu of participating at any time in a proceeding to set rates and terms for Eligible Transmissions and related ephemeral recordings for any part of the 2006–2015 period. Thus, once a Commercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in *Intercollegiate Broadcasting Sys.* v. *Copyright Royalty Board* (DC Circuit Docket Nos. 07–1123, 07–1168, 07–1172, 07–1173, 07–1174, 07–1177, 07–1178, 07–1179), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009–1 CRB Webcasting III), or any other proceedings to determine royalty rates and terms for Eligible Transmissions and reproduction of related ephemeral phonorecords under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the foregoing or any proceedings on remand from such an appeal, unless subpoenaed on petition of a third party (without any action by a Commercial Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

5.3 *Use of Agreement in Future Proceedings.* Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) is expressly authorized.

5.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Commercial Webcaster setting alternative rates and terms governing the Commercial Webcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

Article 6—Miscellaneous

6.1 *Acknowledgement.* The parties acknowledge this agreement was entered into knowingly and willingly. The parties further acknowledge that any transmission made by a Commercial Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106 and the remedies in 17 U.S.C. 501–506, and all limitations, exceptions and defenses available with respect thereto.

6.2 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and Commercial Webcasters consent to the jurisdiction and venue of the foregoing court, waive any objection thereto on forum *non conveniens* or similar grounds, and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

6.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations. No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

6.4 *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and a Commercial Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Commercial Webcaster with respect to the subject matter hereof.

Appendix B—Agreed Rates and Terms for Noncommercial Educational Webcasters

Article 1—Definitions

1.1 *General.* In general, words used in the rates and terms set forth herein (the *"Rates and Terms"*) and defined in 17 U.S.C. 112(e) or 114 or 37 CFR Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

1.2.1 *"Noncommercial Educational Webcaster"* shall mean a Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that (i) has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings; (ii) complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations; (iii) is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically-accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution, and (iv) is not a "public broadcasting entity" (as defined in 17 U.S.C. 118(g)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396.

1.2.2 *"Eligible Transmission"* shall mean an eligible nonsubscription transmission made by a Noncommercial Educational Webcaster over the Internet.

1.2.3 *"SoundExchange"* shall mean SoundExchange, Inc. and shall include its successors and assigns.

1.2.4 *"ATH" or "Aggregate Tuning Hours"* shall mean the total hours of programming that a Noncommercial Educational Webcaster has transmitted during the relevant period to all listeners within the United States over all channels and stations that provide audio programming consisting, in whole or in part, of Eligible Transmissions, including from any archived programs, less the actual running time of any sound recordings for which the Noncommercial Educational Webcaster has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a Noncommercial Educational Webcaster transmitted one hour of programming to 10 simultaneous listeners, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one listener listened to a Noncommercial Educational Webcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the Noncommercial Educational Webcaster's Aggregate Tuning Hours would equal 10.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2009

2.1 *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, Noncommercial Educational Webcasters may elect to be subject to the rates and terms set forth herein in their entirety, with respect to Eligible Transmissions and related ephemeral recordings, for all of any one or more calendar years during the period beginning on January 1, 2011, and ending on December 31, 2015 (the *"Term"*), in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2.2.1 hereof. In addition, Noncommercial Educational Webcasters may elect to be subject to the provisions of Article 5 only, for all of the period beginning on January 1, 2009, and ending on December 31, 2010 (the *"Special Reporting Term"*), in lieu of reporting under 37 CFR Part 370.3, by complying with the procedure set forth in Section 2.2.3 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Noncommercial Educational Webcaster must comply with otherwise applicable rates and terms.

2.2 Election Process

2.2.1 *In General.* To elect to be subject to these Rates and Terms, in their entirety, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for any calendar year during the Term, a Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by January 31st of each such calendar year or, in the case of a Noncommercial Educational Webcaster that has not made Eligible Transmissions as of January 31st of a calendar year within the Term but begins doing so at a later time that year and seeks to be subject to these Rates and Terms for that year, 45 days after the end of the month in which the Noncommercial Educational Webcaster begins making such Eligible Transmissions. Even if an entity has once elected to be treated as a Noncommercial Educational Webcaster, it must make a separate, timely election in each subsequent calendar year in which it wishes (and is eligible) to be treated as such. A Noncommercial Educational Webcaster may instead elect other available rates for which it is eligible. However, a Noncommercial Educational Webcaster may not elect different rates for a given calendar year after it has elected to be subject to these Rates and Terms or for any year in which it has already paid royalties.

2.2.2 *Contents of Election Form.* On its election form(s) pursuant to Section 2.2.1, the Noncommercial Educational Webcaster must, among other things, provide a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, on a form provided by SoundExchange, that the Noncommercial Educational Webcaster (i) qualifies as a Noncommercial Educational Webcaster for the relevant year, and (ii) did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a Statement of Account and pay required Usage Fees. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions. If, subsequent to making an election, there are changes in the Noncommercial Educational Webcaster's corporate name or stations making Eligible Transmissions, or other changes in its corporate structure that affect the application of these Rates and Terms, the Noncommercial Educational Webcaster shall promptly notify SoundExchange thereof. On its election form(s), the Noncommercial Educational Webcaster must, among other things, identify which of the reporting options set forth in Section 5.1 it elects for the relevant year (provided that it must be eligible for the option it elects).

2.2.3 *Election for Special Reporting Term.* A Noncommercial Educational Webcaster may elect to be subject to the provisions of Article 5 only, for all of the Special Reporting Term, in lieu of reporting under 37 CFR Part 370.3 as it may from time to time exist. To do so, the Noncommercial Educational Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*), which SoundExchange may combine with its form of Statement of Account. Such form must be submitted with timely payment of the Noncommercial Educational Webcaster's minimum fee for 2010 under 37 CFR 380.4(d) and the Proxy Fee described in Section 5.1.1 for both 2009 and 2010 if applicable. On any such election form, the Noncommercial Educational Webcaster must, among other things, provide (i) a certification, signed by an officer or another duly authorized faculty member or administrator of the institution with which the Noncommercial Educational Webcaster is affiliated, that the Noncommercial Educational Webcaster qualifies as a Noncommercial Educational Webcaster for the Special Reporting Term, and (ii) identification of all its stations making Eligible Transmissions and which of the reporting options set forth in Section 5.1 it elects for the Special Reporting Term (provided that it must be eligible for the option it elects for the entire Special Reporting Term).

2.2.4 *Participation in Specified Proceedings.* Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Noncommercial Educational Webcaster that has participated or is participating in any way in any appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination"), any proceedings on remand from such appeal, *Digital Performance Right in Sound Recordings and Ephemeral Recordings* (Copyright Royalty Judges' Docket No. 2009–1 CRB Webcasting III), *Digital Performance Right in Sound Recordings and Ephemeral Recordings for a New Subscription Service* (Copyright Royalty Judges' Docket No. 2009–2 CRB New Subscription II), or any other proceeding to determine royalty rates or terms under Sections 112(e) or 114 of the Copyright Act for all or any part of the period January 1, 2006, through December 31, 2015 (all of the foregoing, including appeals of the proceedings identified above, collectively *"Specified Proceedings"*) shall not have the right to elect to be treated as a Noncommercial Educational Webcaster or claim the benefit of these Rates and Terms, unless it withdraws from such proceeding(s) prior to submitting to SoundExchange a completed and signed election form as contemplated by Section 2.2.1 or 2.2.3, as applicable. In addition, once a Noncommercial Educational Webcaster has elected to be subject to these Rates and Terms, either for the Special Reporting Term or any part of the Term, it shall not at any time participate as a party, intervenor, *amicus curiae* or otherwise, or give evidence or otherwise support or assist, in any Specified Proceeding, unless subpoenaed on petition of a third party (without any action by a Noncommercial Educational Webcaster to encourage or suggest such a subpoena or petition) and ordered to testify or provide documents in such proceeding.

2.3 *Representation of Compliance and Non-Waiver.* By electing to operate pursuant to the Rates and Terms, either for the Special Reporting Term or any part of the Term, an entity represents and warrants that it qualifies as a Noncommercial Educational Webcaster and is eligible for the reporting option set forth in Section 5.1 that it elects. By accepting an election by a transmitting entity pursuant to these Rates and Terms or any payments or reporting made by a transmitting entity, SoundExchange does not acknowledge that the transmitting entity qualifies as a Noncommercial Educational Webcaster or for a particular reporting option or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). It is the responsibility of each transmitting entity to ensure that it is eligible for the statutory licenses under Sections 112(e) and 114 of the Copyright Act and in full compliance with applicable requirements thereof. SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a transmitting entity agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms) and shall not be used as evidence that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright

owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with all applicable requirements that are not inconsistent with these Rates and Terms.

Article 3—Scope

3.1 *In General.* Noncommercial Educational Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and in strict conformity with the provisions of 17 U.S.C. 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, for each calendar year within the Term that they have made a timely election to be subject to these Rates and Terms.

3.2 *Applicable to All Services Operated by or for a Noncommercial Educational Webcaster.* If a Noncommercial Educational Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2.1, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Noncommercial Educational Webcaster and related ephemeral recordings. For clarity, a Noncommercial Educational Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 112(e) and 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations. However, a single educational institution may have more than one webcasting station making Eligible Transmissions. If so, each such station may determine individually whether it elects to be subject to these Rates and Terms as a Noncommercial Educational Webcaster. It is expressly contemplated that within a single educational institution, one or more Noncommercial Educational Webcasters and one or more public broadcasting entities (as defined in 17 U.S.C. 118(g)) may exist simultaneously, each paying under a different set of rates and terms.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Noncommercial Educational Webcasters and grant no rights, including by implication or estoppel, to any other person or entity, or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. 112(e) and 114.

Article 4—Royalties

4.1 *Minimum Fee.* Each Noncommercial Educational Webcaster shall pay an annual, nonrefundable minimum fee of $500 (the *"Minimum Fee"*) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it elects to be subject to these Rates and Terms. For clarity, each individual stream (*e.g.*, HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in Section 5.1.1 shall pay a $100 annual fee (the *"Proxy Fee"*) to SoundExchange.

4.2 *Additional Usage Fees.* If, in any month, a Noncommercial Educational Webcaster makes total transmissions in excess of 159,140 Aggregate Tuning Hours (*"ATH"*) on any individual channel or station, the Noncommercial Educational Webcaster shall pay additional usage fees (*"Usage Fees"*) for the Eligible Transmissions it makes on that channel or station after exceeding 159,140 total ATH at the following per-performance rates:

Year	Rate per performance
2011	$0.0017
2012	0.0020
2013	0.0022
2014	0.0023
2015	0.0025

For a Noncommercial Educational Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.1.3, the Noncommercial Educational Webcaster may pay Usage Fees on an ATH basis, provided that the Noncommercial Educational Webcaster shall pay Usage Fees at the per-performance rates provided above in this Section 4.2 based on the assumption that the number of sound recordings performed is 12 per hour. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally-applicable methodology for distributing royalties paid on such basis.

A Noncommercial Educational Webcaster offering more than one channel or station shall pay Usage Fees on a per channel or station basis.

4.3 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015.

4.4 Statements of Account and Payment

4.4.1 *Minimum Fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account in a form available on the SoundExchange Web site at *http://www.soundexchange.com* (*"Statement of Account"*) by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster's election to be subject to these Rates and Terms for the applicable calendar year.

4.4.2 *Usage Fees.* Noncommercial Educational Webcasters required to pay Usage Fees shall submit a Minimum Fee and Statement of Account in accordance with Section 4.4.1, and in addition, a Statement of Account accompanying any Usage Fees owed pursuant to Section 4.2. Such a Statement of Account and accompanying Usage Fees shall be due 45 days after the end of the month in which the excess usage occurred.

4.4.3 *Identification of Statements of Account.* Noncommercial Educational Webcasters shall include on each of their Statements of Account (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Statement of Account covers a single station only, the call letters or name of the station.

4.4.4 *Payment.* Payments of all amounts specified in these Rates and Terms shall be made to SoundExchange.

4.5 *Late Fees.* A Noncommercial Educational Webcaster shall pay a late fee for each instance in which any payment, any Statement of Account or any Report of Use (as defined in Section 5.1 below) is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late Statement of Account or Report of Use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, Statement of Account or Report of Use until a fully compliant Payment, Statement of Account or Report of Use (as applicable) is received by SoundExchange, provided that, in the case of a timely provided but noncompliant Statement of Account or Report of Use, SoundExchange has notified the Noncommercial Educational Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

Article 5—Reporting

5.1 *Provision of Reports of Use.* Noncommercial Educational Webcasters shall have the following three options, as applicable, with respect to provision of reports of use of sound recordings (*"Reports of Use"*):

5.1.1 *Reporting Waiver.* In light of the unique business and operational circumstances currently existing with respect to these services, a Noncommercial Educational Webcaster that did not exceed 55,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 55,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay a nonrefundable, annual Proxy Fee of $100 in

lieu of providing Reports of Use for the calendar year. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 55,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in this Section 5.1.1 during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 55,000 total ATH per month during that calendar year. SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Educational Webcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. The Proxy Fee is intended to defray SoundExchange's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in Section 2.2.1 for making the Noncommercial Educational Webcaster's election to be subject to these Rates and Terms for the applicable calendar year (or in the case of the Special Reporting Term, by the date specified in Section 2.2.3) and shall be accompanied by a certification on a form provided by SoundExchange, signed by an officer or another duly authorized faculty member or administrator of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage, and if applicable, measures to ensure that it will not make excess Eligible Transmissions in the future.

5.1.2 *Sample-Basis Reports.* A Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 159,140 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect (as described in Section 2.2.2) to provide Reports of Use on a sample basis (two weeks per calendar quarter) in accordance with the regulations at 37 CFR 370.3 as they existed at January 1, 2009, except that notwithstanding 37 CFR 370.3(c)(2)(vi), such an electing Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances and may in lieu thereof provide channel or station name and play frequency (*i.e.*, number of spins). Notwithstanding the foregoing, a Noncommercial Educational Webcaster that is able to report ATH or actual total performances is encouraged to do so. These Reports of Use shall be submitted to SoundExchange no later than January 31st of the year immediately following the year to which they pertain.

5.1.3 *Census-Basis Reports.* If any of the following three conditions is satisfied, a Noncommercial Webcaster must report pursuant to this Section 5.1.3: (i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year, (ii) the Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year, or (iii) the Noncommercial Educational Webcaster otherwise does not elect (as described in Section 2.2.2) to be subject to Section 5.1.1 or 5.1.2. A Noncommercial Educational Webcaster required to report pursuant to this Section 5.1.3 shall provide Reports of Use to SoundExchange quarterly on a census reporting basis (*i.e.*, Reports of Use shall include every sound recording performed in the relevant quarter), containing information otherwise complying with applicable regulations (but no less information than required by 37 CFR 370.3 as of January 1, 2009), except that notwithstanding 37 CFR 370.3(c)(2)(vi), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency (*i.e.*, number of spins), during the first calendar year it is required to report in accordance with this Section 5.1.3. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to report in accordance with this Section 5.1.3 for a full calendar year, it must thereafter include ATH or actual total performances in its Reports of Use. All Reports of Use under this Section 5.1.3 shall be submitted to SoundExchange no later than the 45th day after the end of each calendar quarter.

5.2 *Delivery of Reports.* Reports of Use submitted by Noncommercial Educational Webcasters shall conform to the following additional requirements:

5.2.1 Noncommercial Educational Webcasters shall either submit a separate Report of Use for each of their stations, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

5.2.2 Noncommercial Educational Webcasters shall transmit each Report of Use in a file the name of which includes (i) the name of the Noncommercial Educational Webcaster, exactly as it appears on its notice of use, and (ii) if the Report of Use covers a single station only, the call letters or name of the station.

5.2.3 Noncommercial Educational Webcasters shall submit reports of use with headers, as such headers are described in 37 CFR 370.3(d)(7).

5.3 *Server Logs.* To the extent not already required by the current regulations set forth in 37 CFR Part 380, as they existed on January 1, 2009, Noncommercial Educational Webcasters shall retain for a period of at least three full calendar years server logs sufficient to substantiate all information relevant to eligibility, rate calculation and reporting hereunder. To the extent that a third-party web hosting or service provider maintains equipment or software for a Noncommercial Educational Webcaster and/or such third party creates, maintains, or can reasonably create such server logs, the Noncommercial Educational Webcaster shall direct that such server logs be created and maintained by said third party for a period of at least three full calendar years and/or that such server logs be provided to, and maintained by, the Noncommercial Educational Webcaster.

Article 6—Additional Provisions

6.1 *Applicable Regulations.* To the extent not inconsistent with the Rates and Terms herein, all applicable regulations, including 37 CFR Parts 370 and 380, shall apply to activities subject to these Rates and Terms. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. Noncommercial Educational Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 *Use of Agreement in Future Proceedings.* Pursuant to 17 U.S.C. 114(f)(5)(C), submission of these Rates and Terms in a proceeding under 17 U.S.C. 114(f) by any participant in such proceeding is expressly authorized.

6.3 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Noncommercial Educational Webcaster setting alternative rates and terms governing the Noncommercial Educational Webcaster's transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.4 *Default.* A Noncommercial Educational Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to do so, SoundExchange may give written notice to the Noncommercial Educational Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Educational Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated by further written notice; provided, however, that such period shall be 60 (rather than 30) days in the case of any such notice sent by SoundExchange between May 15 and August 15 or between December 1 and January 30. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given at least two notices of noncompliance. Any transmission made by a Noncommercial Educational Webcaster in violation of these Rates and Terms or Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms), outside the scope of these Rates and Terms or Section 112(e) or 114, or after the expiration or termination of these Rates and Terms shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106 and the remedies in 17 U.S.C. 501–506, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 *Acknowledgement.* The parties acknowledge these Rates and Terms were entered into knowingly and willingly.

7.2 *Applicable Law and Venue.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC. SoundExchange and each Noncommercial Educational Webcaster consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.3 *Rights Cumulative.* The rights, remedies, limitations, and exceptions provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights, defenses, limitations, or exceptions or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.4 *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and any Noncommercial Educational Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Noncommercial Educational Webcaster with respect to the subject matter hereof.

Appendix C—Agreement Concerning Rates and Terms for Public Radio

This Agreement Concerning Rates and Terms for Public Radio ("*Agreement*"), dated as of July 30, 2009 ("*Execution Date*"), is made by and between SoundExchange, Inc. ("*SoundExchange*") and the Corporation for Public Broadcasting ("*CPB*"), on behalf of all Covered Entities (SoundExchange, and CPB each a "*Party*" and, jointly, the "*Parties*"). Capitalized terms used herein are defined in Article 1 below.

Whereas, SoundExchange is the "receiving agent" as defined in 17 U.S.C. 114(f)(5)(E)(ii) designated for collecting and distributing statutory royalties received from Covered Entities for their Web Site Performances;

Whereas, the Webcaster Settlement Act of 2009 (Pub. L. 111–36; to be codified at 17 U.S.C. 114(f)(5)) authorizes SoundExchange to enter into agreements for the reproduction and performance of Sound Recordings under Sections 112(e) and 114 of the Copyright Act that, once published in the **Federal Register**, shall be binding on all Copyright Owners and Performers, in lieu of any determination by the Copyright Royalty Judges;

Whereas, in view of the unique business, economic and political circumstances of CPB, Covered Entities, SoundExchange, Copyright Owners and Performers at the Execution Date, the Parties have agreed to the royalty rates and other consideration set forth herein for the period January 1, 2011 through December 31, 2015;

Now, Therefore, pursuant to 17 U.S.C. 114(f)(5), and in consideration of the mutual promises contained in this Agreement and for other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

Article 1—Definitions

The following terms shall have the meanings set forth below:

1.1 "*Agreement*" shall have the meaning set forth in the preamble.

1.2 "*ATH*" or "*Aggregate Tuning Hours*" means the total hours of programming that Covered Entities have transmitted during the relevant period to all listeners within the United States from all Covered Entities that provide audio programming consisting, in whole or in part, of Web Site Performances, less the actual running time of any sound recordings for which the Covered Entity has obtained direct licenses apart from this Agreement. By way of example, if a Covered Entity transmitted one hour of programming to ten (10) simultaneous listeners, the Covered Entity's Aggregate Tuning Hours would equal ten (10). If three (3) minutes of that hour consisted of transmission of a directly licensed recording, the Covered Entity's Aggregate Tuning Hours would equal nine (9) hours and thirty (30) minutes. As an additional example, if one listener listened to a Covered Entity for ten (10) hours (and none of the recordings transmitted during that time was directly licensed), the Covered Entity's Aggregate Tuning Hours would equal 10.

1.3 "*Authorized Web Site*" means any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator ("*URL*") owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.

1.4 "*CPB*" shall have the meaning set forth in the preamble.

1.5 "*Collective*" shall have the meaning set forth in 37 CFR 380.2(c).

1.6 "*Copyright Owners*" are Sound Recording copyright owners who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

1.7 "*Covered Entities*" means NPR, American Public Media, Public Radio International, and Public Radio Exchange, and, in calendar year 2011, up to four-hundred and ninety (490) Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Covered Entities hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations considered to be Covered Entities is permitted to grow by no more than 10 Originating Public Radio Stations per year beginning in calendar year 2012, such that the total number of Covered Entities at the end of the Term will be less than or equal to 530. The Parties agree that the number of Originating Public Radio Stations licensed hereunder as Covered Entities shall not exceed the maximum number permitted for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Covered Entities as provided in Section 4.4.

1.8 "*Ephemeral Phonorecord*" shall have the meaning set forth in Section 3.1(b).

1.9 "*Execution Date*" shall have the meaning set forth in the preamble.

1.10 "*License Fee*" shall have the meaning set forth in Section 4.1.

1.11 "*Music ATH*" means ATH of Web Site Performances of Sound Recordings of musical works.

1.12 "*NPR*" shall mean National Public Radio, with offices at 635 Massachusetts Avenue, NW., Washington, DC 20001.

1.13 "*Originating Public Radio Stations*" shall mean a noncommercial terrestrial radio broadcast station that (i) is licensed as such by the Federal Communications Commission; (ii) originates programming and is not solely a repeater station; (iii) is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from the Corporation for Public Broadcasting pursuant to its criteria; (iv) qualifies as a "noncommercial webcaster" under 17 U.S.C. 114(f)(5)(E)(i); and (v) either (a) offers Web Site Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501), or (b) in the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

1.14 "*Party*" shall have the meaning set forth in the preamble.

1.15 "*Performers*" means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the individuals and entities identified in 17 U.S.C. 114(g)(2)(D).

1.16 "*Person*" means a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

1.17 *"Phonorecords"* shall have the meaning set forth in 17 U.S.C. 101.

1.18 *"Side Channel"* means any Internet-only program available on an Authorized Web Site or an archived program on such Authorized Web Site that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

1.19 *"SoundExchange"* shall have the meaning set forth in the preamble and shall include any successors and assigns to the extent permitted by this Agreement.

1.20 *"Sound Recording"* shall have the meaning set forth in 17 U.S.C. 101.

1.21 *"Term"* shall have the meaning set forth in Section 7.1.

1.22 *"Territory"* means the United States, its territories, commonwealths and possessions.

1.23 *"URL"* shall have the meaning set forth in Section 1.3.

1.24 *"Web Site"* means a site located on the World Wide Web that can be located by a Web Site User through a principal URL.

1.25 *"Web Site Performances"* means all public performances by means of digital audio transmissions of Sound Recordings, including the transmission of any portion of any Sound Recording, made through an Authorized Web Site in accordance with all requirements of 17 U.S.C. 114, from servers used by a Covered Entity (*provided that* the Covered Entity controls the content of all materials transmitted by the server), or by a sublicensee authorized pursuant to Section 3.2, that consist of either (a) the retransmission of a Covered Entity's over-the-air terrestrial radio programming or (b) the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Covered Entity. This term does not include digital audio transmissions made by any other means.

1.26 *"Web Site Users"* means all those who access or receive Web Site Performances or who access any Authorized Web Site.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2009

2.1 *General.* This Agreement is entered into pursuant to the Webcaster Settlement Act of 2009 (Pub. L. 111–36; to be codified at 17 U.S.C. 114(f)(5)).

2.2 *Eligibility Conditions.* The only webcasters (as defined in 17 U.S.C. 114(f)(5)(E)(iii)) eligible to avail themselves of the terms of this Agreement as contemplated by 17 U.S.C. 114(f)(5)(B) are the Covered Entities, as expressly set forth herein. The terms of this Agreement shall apply to the Covered Entities in lieu of other rates and terms applicable under 17 U.S.C. 112 and 114.

2.3 *Agreement Nonprecedential.* Consistent with 17 U.S.C. 114(f)(5)(C), this Agreement, including any rate structure, fees, terms, conditions, and notice and recordkeeping requirements set forth therein, is nonprecedential and shall not be introduced nor used by any Person, including the Parties and any Covered Entities, as evidence or otherwise taken into account in any administrative, judicial, or other proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under 17 U.S.C. 114(f)(4) or 112(e)(4), or any administrative or judicial proceeding pertaining to rates, terms or reporting obligations for any yet-to-be-created right to collect royalties for the performance of Sound Recordings by any technology now or hereafter known. Any royalty rates, rate structure, definitions, terms, conditions and notice and recordkeeping requirements included in this Agreement shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers, and the participation by NPR on behalf of itself and its member stations in *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III (the pending proceeding before the Copyright Royalty Judges to set statutory rates and terms for 2011–2015), rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in Section 801(b) of the Copyright Act.

2.4 *Reservation of Rights.* The Parties agree that the entering into of this Agreement shall be without prejudice to any of their respective positions in any proceeding with respect to the rates, terms or reporting obligations to be established for the making of Ephemeral Phonorecords or the digital audio transmission of Sound Recordings after the Term of this Agreement on or by Covered Entities under 17 U.S.C. 112 and 114 and their implementing regulations. The Parties further acknowledge and agree that the entering of this Agreement, the performance of its terms, and the acceptance of any payments and reporting by SoundExchange (i) do not express or imply any acknowledgement that CPB, Covered Entities, or any other persons are eligible for the statutory license of 17 U.S.C. 112 and 114, and (ii) shall not be used as evidence that CPB, the Covered Entities, or any other persons are acting in compliance with the provisions of 17 U.S.C. 114(d)(2)(A) or (C) or any other applicable laws or regulations.

Article 3—Scope of Agreement

3.1 General

(a) *Public Performances.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that publicly perform under Section 114 all or any portion of any Sound Recordings through an Authorized Web Site, within the Territory, by means of Web Site Performances, may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such transmissions are made in strict conformity with the provisions of 17 U.S.C. 114(d)(2)(A) and (C); and (ii) such Covered Entities comply with all of the terms and conditions of this Agreement and all applicable copyright laws. For clarity, there is no limit to the number of Web Site Performances that a Covered Entity may transmit during the Term under the provisions of this Section 3.1(a), if such Web Site Performances otherwise satisfy the requirements of this Agreement.

(b) *Ephemeral Phonorecords.* In consideration for the payment of the License Fee by CPB, SoundExchange agrees that Covered Entities that make and use solely for purposes of transmitting Web Site Performances as described in Section 3.1(a), within the Territory, Phonorecords of all or any portion of any Sound Recordings (*"Ephemeral Phonorecords"*), may do so in accordance with and subject to the limitations set forth in this Agreement; *provided that:* (i) Such Phonorecords are limited solely to those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances licensed hereunder; (ii) such Phonorecords are made in strict conformity with the provisions set forth in 17 U.S.C. 112(e)(1)(A)–(D); and (iii) the Covered Entities comply with 17 U.S.C. 112 (a) and (e) and all of the terms and conditions of this Agreement.

3.2 *Limited Right to Sublicense.* Rights under this Agreement are not sublicensable, except that a Covered Entity may employ the services of a third Person to provide the technical services and equipment necessary to deliver Web Site Performances on behalf of such Covered Entity pursuant to Section 3.1, but only through an Authorized Web Site. Any agreement between a Covered Entity and any third Person for such services shall (i) contain the substance of all terms and conditions of this Agreement and obligate such third Person to provide all such services in accordance with all applicable terms and conditions of this Agreement, including, without limitation, Articles 3, 5 and 6; (ii) specify that such third Person shall have no right to make Web Site Performances or any other performances or Phonorecords on its own behalf or on behalf of any Person or entity other than a Covered Entity through the Covered Entity's Authorized Web Site by virtue of this Agreement, including in the case of Phonorecords, pre-encoding or otherwise establishing a library of Sound Recordings that it offers to a Covered Entity or others for purposes of making performances, but instead must obtain all necessary licenses from SoundExchange, the copyright owner or another duly authorized Person, as the case may be; (iii) specify that such third Person shall have no right to grant any further sublicenses; and (iv) provide that SoundExchange is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third party.

3.3 Limitations

(a) *Reproduction of Sound Recordings.* Except as provided in Section 3.2, nothing in this Agreement grants Covered Entities, or authorizes Covered Entities to grant to any other Person (including, without limitation, any Web Site User, any operator of another Web Site or any authorized sublicensee), the right to reproduce by any means, method or process whatsoever, now known or hereafter developed, any Sound Recordings, including, but not limited to, transferring or

downloading any such Sound Recordings to a computer hard drive, or otherwise copying the Sound Recording onto any other storage medium.

(b) *No Right of Public Performance.* Except as provided in Section 3.2, nothing in this Agreement authorizes Covered Entities to grant to any Person the right to perform publicly, by means of digital transmission or otherwise, any Sound Recordings.

(c) *No Implied Rights.* The rights granted in this Agreement extend only to Covered Entities and grant no rights, including by implication or estoppel, to any other Person, except as expressly provided in Section 3.2. Without limiting the generality of the foregoing, this Agreement does not grant to Covered Entities (i) any copyright ownership interest in any Sound Recording; (ii) any trademark or trade dress rights; (iii) any rights outside the Territory; (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other Person; or (v) any rights outside the scope of a statutory license under 17 U.S.C. 112(e) and 114.

(d) *Territory.* The rights granted in this Agreement shall be limited to the Territory.

(e) *No Syndication Rights.* Nothing in this Agreement authorizes any Web Site Performances to be accessed by Web Site Users through any Web Site other than an Authorized Web Site.

3.4 *Effect of Non-Performance by any Covered Entity.* In the event that any Covered Entity breaches or otherwise fails to perform any of the material terms of this Agreement it is required to perform (including any obligations applicable under Section 112 or 114), or otherwise materially violates the terms of this Agreement or Section 112 or 114 or their implementing regulations, the remedies of SoundExchange shall be specific to that Covered Entity only, and shall include, without limitation, (i) termination of that Covered Entity's rights hereunder upon written notice to CPB, and (ii) the rights of SoundExchange and Copyright owners under applicable law. SoundExchange's remedies for such a breach or failure by an individual Covered Entity shall not include termination of this Agreement in its entirety or termination of the rights of other Covered Entities, except that if CPB breaches or otherwise fails to perform any of the material terms of this Agreement, or such a breach or failure by a Covered Entity results from CPB's inducement, and CPB does not cure such breach or failure within thirty (30) days after receiving notice thereof from SoundExchange, then SoundExchange may terminate this Agreement in its entirety, and a prorated portion of the License Fee for the remainder Term shall, after deduction of any damages payable to SoundExchange by virtue of the breach or failure, be credited to statutory royalty obligations of Covered Entities to SoundExchange for the Term as specified by CPB.

Article 4—Consideration

4.1 *License Fee.* The total license fee for all Web Site Performances and Ephemeral Phonorecords made during the Term shall be two million four hundred thousand dollars ($2,400,000) (the "*License Fee*"), unless additional payments are required as described in Section 4.3 or 4.4. CPB shall pay such amount to SoundExchange in five equal installments of four hundred eighty thousand dollars ($480,000) each, which shall be due December 31, 2010 and annually thereafter through December 31, 2014.

4.2 *Calculation of License Fee.* The Parties acknowledge that the License Fee includes: (i) an annual minimum fee of five hundred dollars ($500) for each Covered Entity for each year during the Term; (ii) additional usage fees calculated at a royalty rate equal to one third the royalty rate applicable to commercial broadcasters under the Webcaster Settlement Act of 2008 (*see* 74 FR 9299 (March 3, 2009)); and (iii) a discount that reflects the administrative convenience to SoundExchange of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

4.3 Total Music ATH True-Up

(a) If the total Music ATH for all Covered Entities, in the aggregate for any calendar year during the period 2011–2015, as reported or estimated in accordance with Attachment 1, is greater than the Music ATH cap for the year specified in the table below, CPB shall make an additional payment to SoundExchange for all such Music ATH in excess of such Music ATH cap for all Covered Entities in the aggregate on the basis of the per performance rate for the year specified in the table below, which shall be applied to excess Music ATH by assuming twelve (12) performances for each hour of excess Music ATH:

Year	Music ATH cap	Per performance rate
2011	279,500,000	$0.00057
2012	280,897,500	0.00067
2013	282,301,988	0.00073
2014	283,713,497	0.00077
2015	285,132,065	0.00083

(b) Payments under Section 4.3(a) shall be due no later than March 1 of the year following the year to which they pertain. SoundExchange may distribute royalties paid under Section 4.3(a) in accordance with its generally-applicable methodology for distributing royalties paid on the basis of ATH.

(c) Notwithstanding the foregoing provisions of this Section 4.3, CPB shall not be required to make payments under this Section 4.3 exceeding four hundred eighty thousand dollars ($480,000) in the aggregate during the Term. Because the limitation stated in the immediately preceding sentence is to be applied in the aggregate over the Term, CPB shall make all payments otherwise due under this Section 4.3 for excess Music ATH until such time as such payments, if any, for the Term reach four hundred eighty thousand dollars ($480,000) in the aggregate, and thereafter CPB shall owe no further payments under Section 4.3(a) regardless of the amount of excess Music ATH.

4.4 *Station Growth True-Up:* If the total number of Originating Public Radio Stations that wish to make Web Site Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Covered Entities in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Web Site Performances apart from this Agreement, CPB may elect by written notice to SoundExchange to increase the number of Originating Public Radio Stations considered Covered Entities in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to SoundExchange for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Covered Entity, in the amount of five hundred dollars ($500) per Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Covered Entity.

4.5 *Late Fee.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(e) as if that section (and the applicable definitions provided in 37 CFR 380.2) were set forth herein.

4.6. Payments to Third Persons

(a) SoundExchange and CPB agree that, except as provided in Section 4.6(b), all obligations of, *inter alia*, clearance, payment or attribution to third Persons, including, by way of example and not limitation, music publishers and performing rights organizations (PROs) for use of the musical compositions embodied in Sound Recordings, shall be solely the responsibility of CPB and the Covered Entities.

(b) SoundExchange and CPB agree that all obligations of distribution of the License Fee to Copyright Owners and Performers in accordance with 37 CFR 380.4(g) shall be solely the responsibility of SoundExchange. In making such distribution, SoundExchange has discretion to allocate the License Fee between Section 112 and 114 in the same manner as the majority of other webcasting royalties.

Article 5—Reporting, Auditing and Confidentiality

5.1 *Reporting.* CPB and Covered Entities shall submit reports of use and other information concerning Web Site Performances as set forth in Attachments 1 and 2.

5.2 *Verification of Information.* The Parties hereby agree to the terms set forth in 37 CFR 380.4(h) and 380.6 as if those sections (and the applicable definitions provided in 37 CFR 380.2) were set forth herein. The exercise by SoundExchange of any right under this Section 5.2 shall not prejudice any other rights or remedies of SoundExchange.

5.3 *Confidentiality.* The Parties hereby agree to the terms set forth in 37 CFR 380.5 as if that section (and the applicable definitions provided in 37 CFR 380.2) were set forth herein, except that:

(a) The following shall be added to the end of the first sentence of § 380.5(b): "or documents or information that become publicly known through no fault of

SoundExchange or are known by SoundExchange when disclosed by CPB";

(b) the following shall be added at the end of § 380.5(c): "and enforcement of the terms of this Agreement"; and

(c) the following shall be added at the end of § 380.5(d)(4): "subject to the provisions of Section 2.3 of this Agreement".

Article 6—Non-Participation in Further Proceedings

CPB and any Covered Entity making Web Site Transmissions in reliance on this Agreement shall not directly or indirectly participate as a party, *amicus curiae* or otherwise, or in any manner give evidence or otherwise support or assist, in any further proceedings to determine royalty rates and terms for digital audio transmission or the reproduction of Ephemeral Phonorecords under Section 112 or 114 of the Copyright Act for all or any part of the Term, including *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III, any appeal of the determination in such case, any proceedings on remand from such an appeal, or any other related proceedings, unless subpoenaed on petition of a third party (without any action by CPB or a Covered Entity to encourage such a petition) and ordered to testify in such proceeding. Notwithstanding anything to the contrary herein, any entity that is eligible to be treated as a "Covered Entity" but that that does not elect to be treated as a Covered Entity may elect to participate in such proceedings.

Article 7—Term and Termination

7.1 *Term.* The term of this Agreement commences as of January 1, 2011, and ends as of December 31, 2015 ("*Term*"). Through August 27, 2009, CPB shall have the right to rescind this Agreement in its entirety by notifying SoundExchange in writing that it wishes to exercise such right; provided however, that CPB may only exercise such right in the event that the Board of Directors of CPB fails to approve CPB's entering into the Agreement. As conditions precedent to reliance on the terms of this Agreement by any Covered Entity, (a) CPB must pay the License Fee as and when specified in Section 4.1, and (b) NPR must withdraw from participation in the proceeding before the Copyright Royalty Judges entitled *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2009–1 CRB Webcasting III (*see* 74 FR 318 (Jan. 5, 2009)) by no later than September 3, 2009 (which NPR has agreed to do if CPB does not exercise its right of rescission).

7.2 *Mutual Termination.* This Agreement may be terminated in writing upon mutual agreement of the Parties.

7.3 Consequences of Termination

(a) *Survival of Provisions.* In the event of the expiration or termination of this Agreement for any reason, the terms of this Agreement shall immediately become null and void, and cannot be relied upon for making any further Web Site Performances or Ephemeral Phonorecords, except that (i) Articles 6 and 8 and Sections 2.3, 2.4, 3.3, 5.2, 5.3 and 7.3 shall remain in full force and effect; and (ii) Article 4 and Section 5.1 shall remain in effect after the expiration or termination of this Agreement to the extent obligations under Article 4 or Section 5.1 accrued prior to any such termination or expiration.

(b) *Applicability of Copyright Law.* Any Web Site Performances made by a Covered Entity or other Originating Public Radio Station in violation of the terms of this Agreement or Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with this Agreement), outside the scope of this Agreement, or after the expiration or termination of this Agreement for any reason shall be fully subject to, among other things, the copyright owners' rights under 17 U.S.C. 106(6), the remedies in 17 U.S.C. 501 *et seq.*, the provisions of 17 U.S.C. 112(e) and 114, and their implementing regulations unless the Parties have entered into a new agreement for such Web Site Performances.

Article 8—Miscellaneous

8.1 *Applicable Law and Venue.* This Agreement shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising directly or indirectly from or in connection with this Agreement shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC, or if it does not have subject matter jurisdiction, other courts located in the District of Columbia. The Parties and Covered Entities, to the extent permitted under their State or Tribal law, consent to the jurisdiction and venue of the foregoing court and consent that any process or notice of motion or other application to said court or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the Person for which it is intended at its address set forth in this Agreement (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

8.2 *Rights Cumulative.* The remedies provided in this Agreement and available under applicable law shall be cumulative and shall not preclude assertion by any Party of any other rights or the seeking of any other remedies against the other Party hereto. This Agreement shall not constitute a waiver of any violation of Section 112 or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with this Agreement). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. Neither this Agreement nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under this Agreement or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by either Party of full performance by the other Party in any one or more instances shall be a waiver of the right to require full and complete performance of this Agreement and of obligations under applicable law thereafter or of the right to exercise the remedies of SoundExchange under Section 3.4.

8.3 *Severability.* Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be prohibited by or invalid under applicable law, such provisions shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

8.4 *Amendment.* This Agreement may be modified or amended only by a writing signed by the Parties.

8.5 *Entire Agreement.* This Agreement expresses the entire understanding of the Parties and supersedes all prior and contemporaneous agreements and undertakings of the Parties with respect to the subject matter hereof.

8.6 *Headings.* The titles used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement.

In Witness Whereof, the Parties hereto have executed this Agreement as of the date first above written.

Attachment 1—Reporting

1. *Definitions.* The following terms shall have the meaning set forth below for purposes of this Attachment 1. All other capitalized terms shall have the meaning set forth in Article 1 of the Agreement.

(a) "*Content Logs*" shall have the meaning set forth in Section 3(a)(ii) of this Attachment 1.

(b) "*Major Format Group*" shall mean each of the following format descriptions characterizing the programming offered by various Covered Entities: (i) Classical; (ii) jazz; (iii) music mix; (iv) news and information; (v) news/classical; (vi) news/jazz; (vii) news/music mix; and (viii) adult album alternative. A Covered Entity's Major Format Group is determined based on the format description best describing the programming of the principal broadcast service offered by the Covered Entity and will include all channels streamed.

(c) "*Reporting Data*" shall mean, for each Sound Recording for which Reporting Data is to be provided, (1) the relevant Covered Entity (including call sign and community of license of any terrestrial broadcast station and any Side Channel(s)); (2) the title of the song or track performed; (3) the featured recording artist, group, or orchestra; (4) the title of the commercially available album or other product on which the Sound Recording is found; (5) the marketing label of the commercially available album or other product on which the sound recording is found; and (6) play frequency.

2. *General.* All data required to be provided hereunder shall be provided to SoundExchange electronically in the manner provided in 37 CFR 370.3(d), except to the extent the parties agree otherwise. CPB shall consult with SoundExchange in advance

concerning the content and format of all data to be provided hereunder, and shall provide data that is accurate, to the best of CPB's and the relevant Covered Entity's knowledge, information and belief. The methods used to make estimates, predictions and projections of data shall be subject to SoundExchange's prior written approval, which shall not be unreasonably withheld.

3. *Data Collection and Reporting.* CPB shall provide data regarding Web Site Performances during the Term to SoundExchange, and Covered Entities shall provide such data to CPB, consistent with the following terms:

(a) *ATH and Content Logs.* For each calendar quarter during the Term:

(i) *Music ATH Reporting.* CPB shall provide reports (the "ATH Reports") of Music ATH by all Covered Entities. Such ATH reports shall be accompanied by the Content Logs described in Section 3(a)(ii) for the periods described therein for all Covered Entities. All ATH Reports and Content Logs for a quarter shall be provided by CPB together in one single batch, but all data shall be broken out by Covered Entity and identify each Covered Entity's Major Format Group. The ATH Reports shall be in a form similar to CPB's Streaming Census Report dated October 18, 2007, except as otherwise provided in this Section 3(a)(i).

(ii) *Reporting Period and Data.* The information about Music ATH referenced in Section 3(a)(i) shall be collected from Covered Entities for two 7-consecutive-day reporting periods per quarter. The ATH Reports shall be provided within thirty (30) days of the end of each calendar quarter. During these reporting periods, Covered Entities shall prepare logs containing Reporting Data for all their Web Site Performances (*"Content Logs"*). These Content Logs shall be compared with server-based logs of Music ATH throughout the reporting period before the ATH Report is submitted to SoundExchange.

(iii) *Additional Data Reporting.* Each quarter, CPB shall, for Covered Entities representing the highest 30% of reported Music ATH, provide SoundExchange Reporting Data collected continuously during each 24 hour period for the majority of their Web Site Performances, along with the Covered Entity's Music ATH, for the relevant quarter. If during any calendar quarter of the Term, additional Covered Entities, in the ordinary course of business, collect Reporting Data continuously during each 24 hour period for the majority of their Web Site Performances, CPB shall provide SoundExchange such data, along with each such Covered Entity's Music ATH, for the relevant quarter.

(b) *ATH and Format Surveys.* CPB shall semiannually survey all Covered Entities to ascertain the number, format and Music ATH of all channels (including but not limited to Side Channels) over which such Covered Entities make Web Site Performances. CPB shall provide the results of such survey to SoundExchange within sixty (60) days after the end of the semiannual period to which it pertains.

(c) *Consolidated Reporting.* Each quarter, CPB shall provide the information required by this Section 3 in one delivery to SoundExchange, with a list of all Covered Entities indicating whether any are not reporting for such quarter.

(d) *Timing.* Except as otherwise provided above, all information required to be provided to SoundExchange under this Section 3 shall be provided as soon as practicable, and in any event by no later than sixty (60) days after the end of the quarter to which it pertains. Such data shall be provided in a format consistent with Attachment 2.

Attachment 2—Reporting Format

1. *Format for Reporting Data.* All Reporting Data provided under Attachment 1, Section 3(a)(ii) shall be delivered to SoundExchange in accordance with the following format:

Column 1 Station or Side Channel
Column 2 Sound Recording Title
Column 3 Featured Artist, Group or Orchestra
Column 4 Album
Column 5 Marketing Label
Column 6 Play Frequency

2. *Format for Music ATH.* All Music ATH reporting by Covered Entities under Attachment 1 shall be delivered to SoundExchange in accordance with the following format:

Column 1 Station or Side Channel
Column 2 Major Format Group
Column 3 ATH
Column 4 Reporting Period

3. *Major Format Groups.* All requirements to provide "Major Format Group" as that term is defined in Attachment 1, Section 1(b), shall correspond with one of the following:

Major Format Groups
Classical
Jazz
Music Mix
News and Information
News/Classical
News/Jazz
News/Music Mix
Adult Album Alternative

Appendix D—Agreed Rates and Terms for Noncommercial Webcasters

Article 1—Definitions

1.1 *General.* In general, words used in the rates and terms set forth herein (the "Rates and Terms") and defined in 17 U.S.C. 112(e) or 114 or 37 CFR Part 380 shall have the meanings specified in those provisions as in effect on the date hereof, with such exceptions or clarifications set forth in Section 1.2.

1.2 Additional Definitions

(a) *"Aggregate Tuning Hour" or "ATH"* shall have the same meaning as set forth in the applicable regulations at 37 CFR 380.2(a) as it existed on July 30, 2009.

(b) *"Broadcast Retransmissions"* shall mean Eligible Transmissions that are retransmissions of terrestrial over-the-air broadcast programming transmitted by the Noncommercial Webcaster through its AM or FM radio station, including ones with substitute advertisements or other programming occasionally substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained. For the avoidance of doubt, a Broadcast Retransmission does not include programming transmitted on an Internet-only side channel.

(c) *"Eligible Transmission"* shall mean an eligible nonsubscription transmission made by a Noncommercial Webcaster over the Internet.

(d) *"Noncommercial Microcaster"* shall mean a Noncommercial Webcaster that for any of its channels or stations over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate, in any calendar year in which it is to be considered a Noncommercial Microcaster, meets the following additional eligibility criteria: (i) During the prior year did not make eligible nonsubscription transmissions exceeding 44,000 aggregate tuning hours; and (ii) during the applicable year reasonably does not expect to make eligible nonsubscription transmissions exceeding 44,000 aggregate tuning hours; provided that, one time during the period 2006–2015, a Noncommercial Webcaster that qualified as a Noncommercial Microcaster under the foregoing definition as of January 31 of one year, elected Noncommercial Microcaster status for that year, and unexpectedly made Eligible Transmissions on one or more channels or stations in excess of 44,000 aggregate tuning hours during that year, may choose to be treated as a Noncommercial Microcaster during the following year notwithstanding clause (i) above if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 44,000 aggregate tuning hours during that following year. Without limitation, as to channels or stations over which a Noncommercial Webcaster transmits Broadcast Retransmissions, the Noncommercial Webcaster may elect Noncommercial Microcaster status only with respect to its channels or stations that meet both of the foregoing criteria.

(e) *"Noncommercial Webcaster"* shall mean a noncommercial webcaster as defined in 17 U.S.C. 114(f)(5)(E)(i). A Noncommercial Webcaster that owns or operates multiple terrestrial AM or FM radio stations may elect to treat each such terrestrial AM or FM radio station as a separate Noncommercial Webcaster.

(f) *"SoundExchange"* shall mean SoundExchange, Inc. and shall include its successors and assigns.

Article 2—Agreement Pursuant to Webcaster Settlement Act of 2009

2.1 *Availability of Rates and Terms.* Pursuant to the Webcaster Settlement Act of 2009, and subject to the provisions set forth below, a Noncommercial Webcaster may elect to be subject to the rates and terms set forth herein (the "Rates and Terms") in their entirety, with respect to such Noncommercial Webcaster's Eligible Transmissions and related ephemeral recordings, for any calendar year that it qualifies as a Noncommercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, in lieu of other rates and

terms from time to time applicable under 17 U.S.C. 112(e) and 114, by complying with the procedure set forth in Section 2.2 hereof. Any person or entity that does not satisfy the eligibility criteria to be a Noncommercial Webcaster and make a timely election pursuant to Section 2.2 must comply with otherwise applicable rates and terms.

2.2 *Election Process in General.* A Noncommercial Webcaster that wishes to elect to be subject to these Rates and Terms, in lieu of any royalty rates and terms that otherwise might apply under 17 U.S.C. 112(e) and 114, for any calendar year that it qualifies as a Noncommercial Webcaster during the period beginning on January 1, 2006, and ending on December 31, 2015, shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than September 15, 2009. Notwithstanding the immediately preceding sentence, if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election by no later than 30 days after the Noncommercial Webcaster begins making such transmissions under the section 114 statutory license. On any such election form, the Noncommercial Webcaster must, among other things, certify that it qualifies as a Noncommercial Webcaster, and SoundExchange shall require only such information on that form as is reasonably necessary to determine the Noncommercial Webcaster's election. If a Noncommercial Webcaster has elected to be treated as a Noncommercial Webcaster in any calendar year, that election shall apply to subsequent calendar years unless the Noncommercial Webcaster notifies SoundExchange by January 31 of the relevant year that it is revoking that election in favor of otherwise applicable rates. Notwithstanding anything else in these Rates and Terms, a person or entity otherwise qualifying as a Noncommercial Webcaster that has participated in any way in the appeal of the Final Determination of the Copyright Royalty Judges concerning royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2006, through December 31, 2010 published in the **Federal Register** at 72 FR 24084 (May 1, 2007) (the "Final Determination"), any proceedings before the Copyright Royalty Judges on remand from such appeal, or any proceeding before the Copyright Royalty Judges to determine royalty rates and terms under Sections 112(e) and 114 of the Copyright Act for the period January 1, 2011, through December 31, 2015 (including Docket No. 2009–1 CRB Webcasting III and Docket No. 2009–2 CRB New Subscription II, as noticed in the **Federal Register** at 74 FR 318–20 (Jan. 5, 2009)) shall not have the right to elect to be treated as a Noncommercial Webcaster or claim the benefit of these Rates and Terms, unless, prior to submitting to SoundExchange a completed and signed election form as contemplated by this Section 2.2, it withdraws from (a) any such proceedings before the Copyright Royalty Judges and (b) the appeal of the Final Determination if the U.S. Court of Appeals of the DC Circuit still retains jurisdiction over that appeal at the time such election is made.

2.3 *Election of Noncommercial Microcaster Status.* A Noncommercial Webcaster that elects to be subject to these Rates and Terms and qualifies as a Noncommercial Microcaster may elect to be treated as a Noncommercial Microcaster for any one or more calendar years that it qualifies as a Noncommercial Microcaster. To do so, the Noncommercial Webcaster shall submit to SoundExchange a completed and signed election form (available on the SoundExchange Web site at *http://www.soundexchange.com*) by no later than January 31 of the applicable year, except that election forms for 2006–2009 shall be due by no later than September 15, 2009. Notwithstanding the immediately preceding sentence, if a Noncommercial Webcaster has not previously made digital audio transmissions of sound recordings under the section 114 statutory license, the Noncommercial Webcaster may make its election to be treated as a Noncommercial Microcaster by no later than 30 days after the Noncommercial Webcaster begins making such transmissions under the section 114 statutory license. On any such election form, the Noncommercial Webcaster must, among other things, certify that it qualifies as a Noncommercial Microcaster; provide information about its prior year aggregate tuning hours and the genres of music it uses; and use commercially reasonable efforts to provide such other information as may be reasonably requested by SoundExchange for use in creating a royalty distribution proxy. Even if a Noncommercial Webcaster has once elected to be treated as a Noncommercial Microcaster, it must make a separate, timely election in each subsequent year in which it wishes to be treated as a Noncommercial Microcaster.

2.4 *Representation of Compliance and Non-waiver.* By accepting an election by a transmitting entity or payments or reporting made pursuant to these Rates and Terms, SoundExchange does not acknowledge that the transmitting entity qualifies as a Noncommercial Webcaster or Noncommercial Microcaster or that it has complied with the eligibility or other requirements of the statutory licenses under Sections 112(e) and 114 of the Copyright Act (including these Rates and Terms). SoundExchange is not in a position to, and does not, make determinations as to whether each of the many services that rely on the statutory licenses is eligible for statutory licensing or any particular royalty payment classification, nor does it continuously verify that such services are in full compliance with all applicable requirements. Accordingly, a transmitting entity agrees that SoundExchange's acceptance of its election, payment or reporting does not give or imply any acknowledgment that it is in compliance with the requirements of the statutory licenses (including these Rates and Terms). SoundExchange and copyright owners reserve all their rights to take enforcement action against a transmitting entity that is not in compliance with those requirements.

Article 3—Scope

3.1 *In General.* In consideration for the payment of royalties pursuant to Article 4 and such other consideration specified herein, Noncommercial Webcasters that have made a timely election to be subject to these Rates and Terms as provided in Section 2.2 are entitled to publicly perform sound recordings within the scope of the statutory license provided by Section 114 by means of Eligible Transmissions, and to make related ephemeral recordings for use solely for purposes of such Eligible Transmissions within the scope of Section 112(e), in accordance with and subject to the limitations set forth in these Rates and Terms and with the provisions of 17 U.S.C. 112(e) and 114 and their implementing regulations (except as otherwise specifically provided herein), in lieu of other rates and terms from time to time applicable under 17 U.S.C. 112(e) and 114, for any calendar year that they qualify as a Noncommercial Webcaster, and have made such an election, during the period beginning on January 1, 2006, and ending on December 31, 2015.

3.2 *Applicability to All Eligible Services Operated by or for a Noncommercial Webcaster.* If a Noncommercial Webcaster has made a timely election to be subject to these Rates and Terms as provided in Section 2.2, these Rates and Terms shall apply to all Eligible Transmissions made by or for the Noncommercial Webcaster that qualify as Performances under 37 CFR 380.2(i), and related ephemeral recordings. For the avoidance of doubt, a Noncommercial Webcaster may not rely upon these Rates and Terms for its Eligible Transmissions of one broadcast channel or station and upon different Section 114 rates and terms for its Eligible Transmissions of other broadcast channels or stations.

3.3 *No Implied Rights.* These Rates and Terms extend only to electing Noncommercial Webcasters and grant no rights, including by implication or estoppel, to any other person or except as specifically provided herein. Without limiting the generality of the foregoing, these Rates and Terms do not grant (i) any copyright ownership interest in any sound recording; (ii) any trademark or trade dress rights; (iii) any rights outside the United States (as defined in 17 U.S.C. 101); (iv) any rights of publicity or rights to any endorsement by SoundExchange or any other person; or (v) any rights with respect to performances or reproductions outside the scope of these Rates and Terms or the statutory licenses under 17 U.S.C. 112(e) and 114.

Article 4—Royalties

4.1 *Minimum Fees.* Each Noncommercial Webcaster shall pay SoundExchange an annual, nonrefundable minimum fee of $500 for each of its individual channels or stations over which it makes Eligible Transmissions, including each of its individual side channels and each of its individual Broadcast Retransmission stations, for each calendar year or part of a calendar year during 2006–2015 during which the Noncommercial

Webcaster is a licensee pursuant to licenses under 17 U.S.C. 112(e) and 114. Upon payment of the minimum fee, the Noncommercial Webcaster will receive a credit in the amount of the minimum fee against any royalties payable hereunder for the same calendar year for the same channel or station. In addition, an electing Noncommercial Microcaster also shall pay a $100 annual fee (the "Proxy Fee") to SoundExchange for the reporting waiver discussed in Section 5.1. Minimum fees and, where applicable, the Proxy Fee shall be paid by January 31 of each year.

4.2 Royalty Rates

(a) The nonrefundable minimum fee payable under Section 4.1 shall constitute full payment for Eligible Transmissions totaling not more than 159,140 aggregate tuning hours per month on the relevant channel or station. If, in any month, a Noncommercial Webcaster makes Eligible Transmissions on a channel or station in excess of 159,140 aggregate tuning hours, the Noncommercial Webcaster shall pay SoundExchange additional royalties for those Eligible Transmissions in excess of 159,140 aggregate tuning hours at the following rates, subject to an election as provided in Section 4.3:

(i) 2006–2010:

(a) $0.0002176 per performance; or

(b) $0.00251 per ATH, except in the case of channels or stations where substantially all of the programming is reasonably classified as news, talk, sports or business programming, in which case the royalty rate shall be $.0002 (.02¢) per aggregate tuning hour;

(ii) 2011–2015:

Year	Per performance rate
2011	$0.00057
2012	0.00067
2013	0.00073
2014	0.00077
2015	0.00083

(b) For a transitional period, to enable Noncommercial Webcasters to implement systems that enable payment on a per performance basis, for years 2011–2013, the Noncommercial Webcaster may pay for those Eligible Transmissions in excess of 159,140 aggregate tuning hours on an ATH basis, assuming 12 performances per hour, except in the case of channels or stations where substantially all of the programming is reasonably classified as news, talk, sports or business programming, in which case the Noncommercial Webcaster may assume one performance per hour, and calculate its payment based on the per performance rates in Section 4.2(a) above. In addition, in years 2014–2015, for a Noncommercial Webcaster unable to calculate actual total performances and not required to report ATH or actual total performances under Section 5.3, the Noncommercial Webcaster may pay for those Eligible Transmissions in excess of 159,140 aggregate tuning hours on an ATH basis using the estimates set forth in this provision and calculating its payment based on the per performance rates in Section 4.2(a) above. SoundExchange may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis.

(c) For the avoidance of doubt, a Noncommercial Webcaster shall calculate its aggregate tuning hours of Eligible Transmissions on each channel or station each month and shall pay any additional royalties owed for such month as provided above in this Section 4.2, but the Noncommercial Webcaster shall not owe any additional royalties for any subsequent months until such time as the Noncommercial Webcaster again exceeds the 159,140 aggregate tuning hour threshold on any channel or station during a given month.

4.3 *Election of Per Performance or Aggregate Tuning Hour Rate.* A Noncommercial Webcaster must consistently pay any additional royalties hereunder based on either the per performance royalties or the aggregate tuning hour royalties set forth in Section 4.2 for all of its channels and stations within any calendar year. The first time each year a Noncommercial Webcaster is required to pay additional royalties under Section 4.2, the Noncommercial Webcaster shall elect to pay all of its additional royalties under Section 4.2 for all of its channels and stations during the remainder of the year based on either the per performance royalties or the aggregate tuning hour royalties set forth in Section 4.2. Thus, for example, a Noncommercial Webcaster may not in one month when its Eligible Transmissions exceed 159,140 aggregate tuning hours calculate its additional royalties based on the per performance royalty and in another month calculate its additional royalties based on the aggregate tuning hour royalty.

4.4 *Ephemeral Royalty.* The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Webcaster and covered hereby is deemed to be included within the royalty payments set forth above. SoundExchange may allocate payments hereunder between the statutory licenses under Sections 112(e) and 114 in the same manner as statutory webcasting royalties for the period 2011–2015.

4.5 *Statements of Account.* A Noncommercial Webcaster shall submit to SoundExchange a monthly statement of account identifying its aggregate tuning hours of Eligible Transmissions for the month, regardless of whether the Noncommercial Webcaster is obligated to pay additional royalties under Section 4.2. Statements of Account, together with any payments required by Section 4.2, shall be due by the 45th day after the end of each month. Each statement of account shall identify (i) the name of the Noncommercial Webcaster, exactly as it appears on its notice of use, and (ii) if the statement covers a single AM or FM radio station only, the call letters of the station.

4.6 *Past Periods.* Notwithstanding anything else in this Agreement, to the extent that a Noncommercial Webcaster that elects to be subject to these Rates and Terms has not paid royalties for all or any part of the period beginning on January 1, 2006, and ending on July 31, 2009, any amounts payable under these Rates and Terms for Eligible Transmissions during such period for which payment has not previously been made shall be paid by no later than September 15, 2009, and for purposes of Section 4.7, any such outstanding payments shall be considered due no earlier than July 30, 2009. If a Noncommercial Webcaster has paid royalties to SoundExchange under the 17 U.S.C. 112(e) and 114 statutory licenses that exceed the amount due under these Rates and Terms, SoundExchange shall credit the amount of such overpayment against anticipated future royalties owed by that Noncommercial Webcaster under these Rates and Terms. If the Noncommercial Webcaster reasonably anticipates that it will not incur royalty payment obligations under these Rates and Terms that exceed the amount of such overpayment on or before December 31, 2010, SoundExchange shall return any excess amounts previously paid by that Noncommercial Webcaster.

4.7 *Late Fees.* A Noncommercial Webcaster shall pay a late fee for each instance in which any payment, any Statement of Account or any report of use is not received by SoundExchange in compliance with these Rates and Terms and applicable regulations by the due date. The amount of the late fee shall be 1.5% of the late payment, or 1.5% of the payment associated with a late Statement of Account or report of use, per month, compounded monthly, or the highest lawful rate, whichever is lower. The late fee shall accrue from the due date of the payment, statement of account or report of use until a fully-compliant payment, statement of account or report of use is received by SoundExchange, provided that, in the case of a timely provided but noncompliant statement of account or report of use, SoundExchange has notified the Noncommercial Webcaster within 90 days regarding any noncompliance that is reasonably evident to SoundExchange.

Article 5—Reporting

5.1 *In General.* On an experimental basis, for purposes of these Rates and Terms only, and in light of the unique business and operational circumstances currently existing with respect to these Noncommercial Webcasters, these Rates and Terms require less than census reporting in certain circumstances and require full census reporting in other circumstances. SoundExchange hopes that offering graduated reporting options to electing Noncommercial Webcasters will promote compliance with statutory license obligations and thereby increase the pool of royalties available to be distributed to copyright owners and performers.

5.2 *Noncommercial Microcasters.* Electing Noncommercial Microcasters shall not be required to provide reports of their use of sound recordings for Eligible Transmissions and related ephemeral recordings. The immediately preceding sentence applies even if the Noncommercial Microcaster actually makes Eligible Transmissions for the year exceeding 44,000 aggregate tuning hours, so long as it qualified

as a Noncommercial Microcaster at the time of its election for that year. Instead, SoundExchange shall distribute the aggregate royalties paid by electing Noncommercial Microcasters based on proxy usage data in accordance with a methodology adopted by SoundExchange's Board of Directors. In addition to minimum royalties hereunder, electing Noncommercial Microcasters shall pay to SoundExchange a $100 Proxy Fee to defray costs associated with this reporting waiver, including development of proxy usage data. SoundExchange hopes that selection of a proxy believed by SoundExchange to represent fairly the playlists of the smallest webcasters will allow payment to more copyright owners and performers than would be possible with any other reasonably available option. If it is practicable for a Noncommercial Webcaster to report its usage pursuant to Section 5.4, it may wish not to elect Noncommercial Microcaster status.

5.3 *Census Reporting for Services Paying Usage-Based Additional Royalties for 2011–2015.* Beginning in 2011, a Noncommercial Webcaster must report its usage as provided in this Section 5.3 in the year following any year in which its average monthly Eligible Transmissions exceeds 159,140 aggregate tuning hours (i) on any channel or station over which it transmits Broadcast Retransmissions, or (ii) for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate. Such Noncommercial Webcasters shall submit reports of use in full compliance with then-applicable regulations (presently 37 CFR 370.3), except that notwithstanding the provisions of applicable regulations from time to time in effect, Noncommercial Webcasters shall submit reports of use on a census reporting basis (*i.e.*, reports of use shall include every sound recording performed in the relevant quarter and the number of plays thereof) and may report on an aggregate tuning hour basis as set forth in 5.4(a) below, and the provisions of Section 5.5 shall apply. Such reports must be submitted for any such channel or station over which it transmits Broadcast Retransmissions, and for all of its channels and stations over which it transmits other Eligible Transmissions in the aggregate, if the same had average monthly Eligible Transmissions exceeding 159,140 aggregate tuning hours. For the avoidance of doubt, if a Noncommercial Webcaster providing reports on a census basis pursuant to this provision does not make average monthly Eligible Transmissions exceeding 159,140 aggregate tuning hours on a channel or station for which it is submitting census reports pursuant to this section in a given calendar year, the Noncommercial Webcaster is entitled to revert to providing reports on a sample basis in accordance with Section 5.4(b) (*i.e.*, two weeks per calendar quarter) beginning in the following calendar year.

5.4 *Other Reporting by Noncommercial Webcasters.* A Noncommercial Webcaster that is not a Noncommercial Microcaster and is not required to report its usage under Section 5.3 must report its usage as provided in this Section 5.4. Such Noncommercial Webcasters shall submit reports of use in compliance with then-applicable regulations (presently 37 CFR 370.3), except that notwithstanding the provisions of applicable regulations from time to time in effect:

(a) Such Noncommercial Webcasters may report on an aggregate tuning hour basis (*i.e.*, reporting their total ATH on a channel, program or station) in lieu of providing actual total performances.

(b) Such Noncommercial Webcasters may report on a sample basis as presently provided in 37 CFR 370.3(c)(3) (*i.e.*, reporting their usage for two weeks per calendar quarter).

(c) The provisions of Section 5.5 shall apply.

5.5 *Detailed Requirements for Reports of Use.* Notwithstanding the provisions of applicable regulations from time to time in effect, the following provisions shall apply to all reports of use required hereunder:

(a) Noncommercial Webcasters shall submit reports of use to SoundExchange on a quarterly basis.

(b) Noncommercial Webcasters shall submit reports of use by no later than the 45th day following the last day of the quarter to which they pertain.

(c) Noncommercial Webcasters that are broadcasters transmitting Broadcast Retransmissions shall either submit a separate report of use for each of their stations transmitting Broadcast Retransmissions, or a collective report of use covering all of their stations but identifying usage on a station-by-station basis.

(d) Noncommercial Webcasters shall transmit each report of use in a file the name of which includes (i) the name of the Noncommercial Webcaster, exactly as it appears on its notice of use, and (ii) if the report covers a single AM or FM radio station only, the call letters of the station.

Article 6—Additional Provisions

6.1 *Applicable Regulations.* To the extent not inconsistent with the terms herein, use of sound recordings by Noncommercial Webcasters shall be governed by, and Noncommercial Webcasters shall comply with, applicable regulations, including 37 CFR Parts 370 and 380. Without limiting the foregoing, the provisions of applicable regulations for the retention of records and verification of statutory royalty payments (presently 37 CFR 380.4(h) and 380.6) shall apply hereunder. Noncommercial Webcasters shall cooperate in good faith with any such verification, and the exercise by SoundExchange of any right with respect thereto shall not prejudice any other rights or remedies of SoundExchange or sound recording copyright owners.

6.2 *Participation in Proceedings.* A Noncommercial Webcaster that elects to be subject to these Rates and Terms agrees that it has elected to do so in lieu of any different statutory rates and terms that may otherwise apply during any part of the 2006–2015 period and in lieu of participating at any time in a proceeding to set rates and terms for any part of the 2006–2015 period. Thus, once a Noncommercial Webcaster has elected to be subject to these Rates and Terms, it shall not at any time directly or indirectly participate as a party, intervenor, *amicus curiae* or otherwise, or in any manner give evidence or otherwise support or assist except pursuant to a subpoena or other formal discovery request, in any further proceedings to determine royalty rates and terms for reproduction of ephemeral phonorecords or digital audio transmission under Section 112(e) or 114 of the Copyright Act for all or any part of the period 2006–2015, including any appeal of the Final Determination, any proceedings on remand from such an appeal, any proceeding before the Copyright Royalty Judges to determine royalty rates and terms applicable to the statutory licenses under Sections 112(e) and 114 of the Copyright Act for the period 2011–2015, any appeal of such proceeding, or any other related proceedings.

6.3 *Use of Agreement in Future Proceedings.* Noncommercial Webcasters and SoundExchange agree that neither the Webcaster Settlement Act nor any provisions of these Rates and Terms shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges. These Rates and Terms shall be considered as a compromise motivated by the unique business, economic and political circumstances of Noncommercial Webcasters, copyright owners and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller. No person or entity may, in any way, seek to use in any way these Rates and Terms in any such proceeding.

6.4 *Effect of Direct Licenses.* Any copyright owner may enter into a voluntary agreement with any Noncommercial Webcaster setting alternative rates and terms governing the Noncommercial Webcasters' transmission of copyrighted works owned by the copyright owner, and such voluntary agreement may be given effect in lieu of the Rates and Terms set forth herein.

6.5 *Default.* A Noncommercial Webcaster shall comply with all the requirements of these Rates and Terms. If it fails to comply in all material respects with the requirements of these Rates and Terms, SoundExchange may give written notice to the Noncommercial Webcaster that, unless the breach is remedied within 30 days from the date of receipt of notice, the Noncommercial Webcaster's authorization to make public performances and ephemeral reproductions under these Rates and Terms may be terminated upon further written notice. No such cure period shall apply before termination in case of material noncompliance that has been repeated multiple times so as to constitute a pattern of noncompliance, provided that SoundExchange has given repeated notices of noncompliance. Any transmission made by a Noncommercial Webcaster outside the scope of Section 112(e) or 114 or these Rates and Terms, or after the expiration or termination of these Rates and Terms shall be fully

subject to, among other things, the copyright owners' rights under 17 U.S.C. 106 and the remedies in 17 U.S.C. 501–506, and all limitations, exceptions and defenses available with respect thereto.

Article 7—Miscellaneous

7.1 *Applicable Law.* These Rates and Terms shall be governed by, and construed in accordance with, the laws of the District of Columbia (without giving effect to conflicts of law principles thereof). All actions or proceedings arising under these Rates and Terms shall be litigated only in the United States District Court for the District of Columbia located in Washington, DC, or if it does not have subject matter jurisdiction, in other courts located in Washington, DC. SoundExchange and Noncommercial Webcasters consent to the jurisdiction and venue of the foregoing courts and consent that any process or notice of motion or other application to said courts or a judge thereof may be served inside or outside the District of Columbia by registered mail, return receipt requested, directed to the person for which it is intended at its last known address (and service so made shall be deemed complete five (5) days after the same has been posted as aforesaid) or by personal service or in such other manner as may be permissible under the rules of that court.

7.2 *Rights Cumulative.* The remedies provided in these Rates and Terms and available under applicable law shall be cumulative and shall not preclude assertion by any party of any other rights or the seeking of any other remedies against another party hereto. These Rates and Terms shall not constitute a waiver of any violation of Section 112(e) or 114 or their implementing regulations (except to the extent such implementing regulations are inconsistent with these Rates and Terms). No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver of such right, power or privilege. Neither these Rates and Terms nor any such failure or delay shall give rise to any defense in the nature of laches or estoppel. No single or partial exercise of any right, power or privilege granted under these Rates and Terms or available under applicable law shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. No waiver by any party of full performance by another party in any one or more instances shall be a waiver of the right to require full and complete performance of these Rates and Terms and of obligations under applicable law thereafter.

7.3 *Entire Agreement.* These Rates and Terms represent the entire and complete agreement between SoundExchange and a Noncommercial Webcaster with respect to their subject matter and supersede all prior and contemporaneous agreements and undertakings of SoundExchange and a Noncommercial Webcaster with respect to the subject matter hereof.

[FR Doc. E9–19299 Filed 8–11–09; 8:45 am]
BILLING CODE 1410–30–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 12153, and no substantial comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, *Attention:* Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send e-mail to *splimpto@nsf.gov.* Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA, 22230, or by e-mail to *splimpto@nsf.gov.*

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION: *Title of Collection:* Research in Disabilities Education Program On-Line Project Data Management System.

OMB Control No.: 3145–0164.

Abstract

The National Science Foundation (NSF) requests a reinstatement of the information collection for the Program for Persons with Disabilities, now called the Research in Disabilities Education (RDE) program. This on-line, annual data collection will describe and track the impact of RDE program funding on Nation's science, technology, engineering and mathematics (STEM) education and STEM workforce.

NSF funds grants, contracts, and cooperative agreements to colleges, universities, and other eligible institutions, and provides graduate research fellowships to individuals in all parts of the United States and internationally. The Directorate for Education and Human Resources (EHR), a unit within NSF, promotes rigor and vitality within the Nation's STEM education enterprise to further the development of the 21st century's STEM workforce and public scientific literacy. EHR does this through diverse projects and programs that support research, extension, outreach, and hands-on activities serving STEM learning and research at all institutional (*e.g.* pre-school through postdoctoral) levels in formal and informal settings; and individuals of all ages (birth and beyond). The RDE program focuses specifically on broadening the participation and achievement of people with disabilities in all fields of STEM education and associated professional careers. The RDE program has been funding this objective since 1994 under the prior name Program for Persons with Disabilities. Particular emphasis is placed on contributing to the knowledge base by addressing disability related differences in secondary and post-secondary STEM learning and in the educational, social and pre-professional experiences that influence student interest, academic performance, retention in STEM degree programs,

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

TESTIMONY OF

JONATHAN BENDER

Chief Operating Officer, SoundExchange, Inc.

PUBLIC VERSION

Witness for SoundExchange, Inc.

I. Introduction

I am the Chief Operating Officer of SoundExchange, Inc. ("SoundExchange"), a position I've held since September 2011. I detailed my professional experience and background in my written direct testimony addressing a variety of administrative and operational issues related to the statutory license.

In this testimony, I will again address administrative and operational issues, including responding directly to proposals raised by other participants. To do this, I have reviewed all of the services' written direct testimony that addresses proposed changes to the terms that govern the statutory license. This included the testimony of Pandora witness Michael Herring ("Herring WDT"), NAB witnesses Steven Newberry ("Newberry WDT") and Jean-Francois Gadoury ("Gadoury WDT"), NRBNMLC witnesses Gene Henes ("Henes WDT") and Joseph Emert ("Emert WDT"), and AccuRadio witness Kurt Hanson ("Hanson WDT"). I have also reviewed the Proposed Rates and Terms that were submitted by Pandora, iHeartMedia, NAB, and NRBNMLC.

Before addressing these issues, let me first note that SoundExchange should be designated the collective for the rate period at issue in this proceeding. In reviewing the proposals of the other participants, I was pleased to see that none of them appear to disagree with this or suggest that the Judges designate any other institution to serve that important role. Thus, as I discuss the effect of the services' proposals on SoundExchange's operations, it is noteworthy that SoundExchange has been and is likely to be the party charged with the day to day collection of royalties and administration of the statutory license.

In this testimony, I will address three sets of issues:

First, I will respond to and comment on many of the services' proposed changes to the rates and terms of the statutory license. Those proposals, several of which are entirely

unsupported by testimony, threaten to interfere with the efficient and orderly administration of the statutory license. Many of the proposals touch upon issues that the Judges are already considering in the pending Notice and Recordkeeping proceeding, Docket No. 14-CRB-0005 RM, and, where appropriate, I will refer to SoundExchange's comments in that proceeding as well.

Second, I will respond to a number of misguided comments directed at SoundExchange's settlement with College Broadcasters, Inc. ("CBI"), which is currently pending before the Judges.

Finally, I will briefly conclude by providing information about the royalties collected by SoundExchange and earned by Doria Roberts, a recording artist whom I understand is providing testimony in this proceeding. Ms. Roberts has asked that I provide the Judges with information regarding her webcasting royalties. According to SoundExchange's records, over the last decade, Ms. Roberts has earned a total of [redacted] in webcasting royalties based upon approximately [redacted] performances of her recordings.

II. Response to the Services' Proposed Terms for the Statutory License

There is a lot of value in maintaining consistency in terms across categories of licensees. As I explained in my direct case testimony, consistent terms aid SoundExchange's administration of the license and make licensees' compliance with the terms more efficient and straightforward. A deviation from the tried and true terms is only appropriate where the proponent of the change can articulate "the need for and the benefits of [the] variance." 73 Fed. Reg. 4099 (Jan. 24, 2008).

None of the services' proposed amendments fall into this category. The services' proposals instead seem to be based on unsupported speculation and fail to appreciate the practical and administrative difficulties SoundExchange faces in the successful and efficient

administration of the statutory license. I'll now explain, based on my knowledge of the day-to-day administration of the license, why each of the services' proposed changes are misguided, and why I find their testimony in support of these changes unpersuasive – to the extent such testimony even exists.

A. Late Fees - § 380.4(e)

Pandora proposes that a "single late fee of 1.5% per month . . . be due in the event both a payment and the statement of account are received by the Collective after the due date." (*See* Pandora Proposed Terms, at 5.)[1] In support of this change, Michael Herring testifies that "duplicative payments . . . are unnecessary, and would be unreasonable and usurious." (Herring WDT, at ¶ 37.)

What Mr. Herring fails to address is that payments and statements of account serve distinct functions and create distinct administrative costs. Because of this, when both the payment and the statement of account are submitted late, SoundExchange incurs additional administrative costs. It's only fair that the service be accountable for these costs if it creates them. Mr. Herring likewise underestimates the crucial importance of late fees to SoundExchange's ability to timely and efficiently distribute royalty payments. If a separate fee were not assessed for untimely statements of account, services would have no incentive to submit their accounting statements in a timely manner. This would be a problem. When either a payment or a statement of account is untimely, SoundExchange's ability to efficiently distribute royalties is impaired. As the Judges recognized in both Web II and SDARS I, the "timely submission of a statement of account is critical to the quick and efficient distribution of

[1] NAB and NRBNMLC propose a similar modification, but they offer no testimony to justify their proposal. (*See* NAB Proposed Terms at 5; NRBNMLC Proposed Terms at 5.)

royalties." 72 Fed. Reg. 24107 (May 1, 2007); 73 Fed. Reg. 4100 (Jan. 24, 2008). The Judges were right. Without both the payment and statement of account in hand, SoundExchange cannot pay artists and copyright owners. A separate 1.5% late fee for untimely statements of account to promote compliance therefore remains critically important.[2]

iHeartMedia, NAB, and NRBNMCLC propose a different amendment to the late fee provision. They each propose that the current 1.5% monthly late fee be changed to the underpayment penalty set forth in 26 U.S.C. § 6621 (an annual rate equal to the federal short-term rate, plus three percentage points, or plus five percentage points where the late payment exceeds $100,000). Of course, Section 6621 by its terms is inapplicable here, because that provision relates to interest on underpayments of taxes. Notably, none of these services offer any explanation as to why this change is necessary or appropriate. It's not. The tax underpayment penalty in 26 U.S.C. § 6621 does not create a sufficient incentive to serve the purpose identified by the Judges of meaningfully encouraging timely submission of payments and statements of account. Moreover, in the direct case Professor Lys demonstrated that market agreements consistently contain a 1.5% monthly late fee term. (*See* Lys WDT, at ¶ 39.) The statutory license should not deviate from this market norm.

B. Corrections to Statements of Account - § 380.4(f)(8)

[2] Of course, the Judges have held that only a single late fee should be payable when a payment and statement of account are submitted together, but late. 73 Fed. Reg. 4100. SoundExchange is not proposing any change in that principle. However, the Judges have been correct in their prior determinations that "if the payment and the statement are submitted separately and both are late," the delinquent service should "pay a 1.5% late fee for the late payment and an additional 1.5% late fee for the untimely statement." *Id.*

Pandora also proposes that services be permitted to make "good faith revisions or adjustments to its Statements of Account." (*See* Pandora Proposed Terms, at 5.) Mr. Herring suggests that after-the-fact corrections should be permitted to ensure that liabilities are properly calculated and that SoundExchange's members are properly paid. (Herring WDT, at ¶ 37.)

However, allowing licensees a second (or third or fourth) chance to submit their statements of account imposes significant operational burdens, particularly if the effect of a submission is to reduce the amount of the relevant royalty payment. While SoundExchange can always allocate an additional payment (with additional effort), there is no assurance that overpayments can be recovered once they are distributed to artists and copyright owners. Once a payment, statement of account, and report of use are submitted, the royalties are processed; SX begins making electronic distributions within 45 days; and most of the money is out the door within 90 days. It is operationally difficult for SoundExchange to claw back royalties that have already been distributed to artists and copyright owners, and in some cases it may simply be impossible. In short, for the reasons SoundExchange recently articulated in its comments in the notice and recordkeeping proceeding, which are attached as Exhibit 1, corrections to the statement of account are disruptive to the orderly and efficient flow of royalties. (*See* Exhibit 1, SX Reply Comments of SoundExchange, Docket No. 14-CRB-0005 (RM), at 61-63 (Sept. 5, 2014) ("SX Reply Comments").) To fully understand why Pandora's proposed amendment to § 380.4(f)(8) is administratively impractical, I direct the Judges to the SX Reply Comments.

SoundExchange has proposed that the current 45-day payment deadline be amended to require payments on or before the 30th day after the end of each month. *See* 37 C.F.R. § 380.4(c). In my direct testimony I explained that a 30-day deadline is more consistent with SoundExchange's norm of monthly distributions and would allow SoundExchange to distribute

royalties in a more timely fashion. (*See* Bender Written Direct Testimony ("Bender WDT"), at 20-21.) Thirty days would give the services more than enough time to submit accurate accounting statements. However, in the event the Judges do not adopt SoundExchange's proposed modification of the payment deadline (and the services maintain 45 days to submit their statements of account), permitting corrections would be even more unnecessary – and it would discourage services from engaging in careful accounting in the first instance.

C. Overpayments

Similarly, iHeartMedia proposes several amendments that would allow licensees to recover overpayments, whether they are detected in an audit or detected by the licensee within three years of submitting payment. (*See* iHeartMedia Proposed Terms, at 6-7.) iHeartMedia offers no testimony in support of its proposed overpayment amendments. In any event, iHeartMedia's proposal is operationally impractical. As explained above, and as set forth in SoundExchange's comments in the notice and recordkeeping proceeding, royalties are mostly distributed within 45-90 days of SoundExchange's receipt of payment, and there is no assurance that overpayments can be recovered once they are distributed to artists and copyright owners. (*See* Exhibit 1, SX Reply Comments, at 61-63.) To permit licensees to deduct previous overpayments, and interest on overpayments, from current royalties owed to different artists and copyright owners years later would be fundamentally unfair – and inaccurate.

D. Reporting Requirements

On behalf of AccuRadio, Kurt Hanson testifies that census reporting requirements are unnecessary and proposes that SoundExchange rely on sample data instead. (*See* Hanson WDT, at ¶ 73.) Such a change would be counter to SoundExchange's mission to ensure integrity in the process of collecting and distributing royalties. SoundExchange endeavors to make sure that

artists and copyright owners are paid accurately for the use of their content. Because playlists can vary significantly from service to service and month to month, census reporting is critical to SoundExchange's ability to effectively carry out this goal. Deviating from the norm of census reporting is only appropriate in exceptional circumstances. I agree with the Judges' observation that "[t]he failure to report the full actual number of performances of a sound recording is at odds with the purpose of the recordkeeping requirement to the extent that, as a result, many sound recordings are under-compensated or not compensated at all from the section 114 and 112 royalties." Notice and Recordkeeping, 73 Fed. Reg. at 79728-29 (Dec. 30, 2008). Here, Mr. Hanson's speculative testimony does nothing to demonstrate that sample data can reasonably approximate the accuracy of census reporting. His proposal should not be embraced.

E. Minimum Fees

Mr. Hanson also proposes that the annual minimum fee be no more than $100 for "nascent webcasters." (Hanson WDT, at ¶ 72.) He provides no empirical basis as to why he deems a mere $100 annual minimum appropriate. *(Id.)* Among other things, the minimum fee is intended to ensure that all licensees make a meaningful contribution to the costs associated with administering the statutory license. 72 Fed. Reg. at 24096 (May 1, 2007). As I testified in the direct case, SoundExchange's administrative expenses in 2013 were approximately $1,900 per channel/station. (*See* Bender WDT, at 18.) The costs to administer a statutory license for nascent webcasters are no lower than the costs attendant with administering the statutory license for other webcasters. Indeed our costs would probably tend to be higher, because of the (i) need to set up a new licensee account, (ii) the staff attention sometimes required to familiarize new licensees with operating procedures under the statutory licenses, and (iii) the likelihood that a

newer, smaller licensee would provide relatively poor-quality usage data. In light of these costs, a $100 annual minimum fee would be unreasonable.

F. Notice and Cure

Three of the services – iHeartMedia, NAB, and NRBNMLC – propose to add a provision that would require SoundExchange to provide licensees notice of their breaches of the terms of the statutory license and an opportunity to cure the breach, apparently without penalty. (*See* iHeartMedia Proposed Terms, at 7; NAB Proposed Terms, at 10; and NRBNMLC, at 10.) They do not, however, offer testimony to support this proposal. First, by far the most common way SoundExchange "asserts" a breach against a license is to contact the licensee informally to inquire about an issue. It would be strange indeed if we could not call or email a licensee concerning a perceived issue without first notifying the licensee by certified mail. Moreover, a notice and cure provision as a precondition to more formal action would be inappropriate and unnecessary. SoundExchange does not certify licensees' compliance with the terms of the statutory license. Nor should SoundExchange be expected to do so. The obligation to ensure compliance with the terms of the statutory license rests on the licensees.

G. Payment Notifications and Receipts

NRBNMLC proposes that regulations be added that require SoundExchange to (i) send email reminders at least one month before the annual minimum payment fee is due, and (ii) send email acknowledgements within one business day of receiving payment. (*See* NRBNMLC Proposed Terms, at 4.) To this first point, SoundExchange already sends annual reminders to all services that pay the minimum fee so long as the service has provided us with accurate contact information. There is no need to add a regulation compelling SoundExchange to do something that we already do as a matter of course.

NRBNMLC's second proposal is not as simple as NRBNMLC suggests. As SoundExchange has explained in its comments in the notice and recordkeeping proceeding with respect to receipts for reports of use, acknowledgement emails can raise of host of administrative challenges. (*See* Exhibit 1, SX Reply Comments, at 90-91.) In any event, SoundExchange anticipates that it will soon launch an online payment portal. We hope licensees will submit their payments through this portal, and we will encourage them to do so. If they do, the portal will acknowledge confirmation. For those who opt to submit their payments via an alternative method, the administrative costs attendant with sending receipts are too significant to justify, especially given that the obligation to ensure timely payment rests on the licensee, not SoundExchange.

H. Definition of ATH

NRBNMLC proposes that the definition of ATH be amended to exclude "any discrete programming segments and any half hours of programming that do not include any Performance." NRBNMLC Proposed Terms at 1.[3] The ATH cap was established by the Judges to demarcate the boundary between the noncommercial webcasting market and the commercial webcasting market. *See* 72 Fed. Reg. 24097 (May 1, 2007). The Judges set the cap based on the average ATH of NPR stations under the current ATH definition. *See id.* at 24099-100. Had the Judges set the cap based on NRBNMLC's definition, the cap would be an entirely different number. To change the definition at this juncture would unjustifiably unmoor the ATH cap from

[3] NAB offers the same ATH definition to accompany its proposed $500 flat rate for "Small Streaming Stations" with less than 876,000 annual ATH, a rate proposal that amounts to a discount of more than $20,000 from the prevailing statutory rate. *See* NAB Proposed Terms at 1. It is my understanding that Professor Lys explains why a rate discount for commercial broadcasters is inappropriate in his expert report. (*See* Lys WRT, at ¶¶ 213-223.)

its original justification and give non-commercial services significant additional value for the same minimum $500 minimum fee.

I. Minimum Fee ATH Threshold for Noncommercial Services

Similarly, there's no sound basis for NRBNMLC's proposal to increase the ATH threshold that determines noncommercial services' eligibility for the minimum fee. (*See* NRBNMLC Proposed Terms, at 3.) Increasing the ATH cap without simultaneously increasing the annual minimum fee amounts to a rate discount. Currently, virtually all noncommercial services pay only a flat $500 fee that defrays only a portion of SoundExchange's $1,900/station administrative costs. To further enlarge the subsidy to noncommercial services is unreasonable and unjustified.

NRBNMLC's witnesses speculate that an increase in the ATH threshold is necessary to make the cap consistent with typical noncommercial stations' current listening levels. (*See* Emert WDT, at ¶ 39; Henes WDT, at ¶ 29.) In its comments regarding SoundExchange's settlement with CBI, NRBNMLC notes that SoundExchange CEO Michael Huppe testified in the direct case that "the online radio audience has more than doubled . . . over the past 7 years." (NRBNMLC Comment, at 7 (quoting Huppe WDT, at ¶ 13).) But growth in the online radio audience isn't the relevant metric for setting the ATH threshold. The ATH cap is tied to the size of noncommercial services specifically, and our data shows that since 2011 more than 97% of noncommercial services have maintained audiences below the current ATH cap. (*See* Bender WDT, at 14.) NRBNMLC's own witnesses confirm that their audiences are in no danger of exceeding the cap. According to Mr. Emert, NewLife FM's average simultaneous listenership is

10, and it maxes out at 100, a number far below the current 218 listener threshold.[4] (*See* Emert WDT, at ¶ 29.) Similarly, The Praise Network's largest radio group averages only 20 simultaneous listeners. (*See* Henes WDT, at ¶ 14.) Based on these numbers, there is no reason to adjust the 159,140 ATH threshold.

NRBNMLC has also proposed a novel tiered, flat payment structure for performances above the ATH threshold. I understand that Professor Lys's rebuttal report indicates that applying this rate structure to performances beyond the boundary at which commercial and noncommercial services converge could have a distortive economic effect on the webcasting market. (*See* Lys WRT, at ¶¶ 255-258.) I note here only that NRBNMLC's proposed rate structure does not appear in any marketplace agreement of which I am aware. By contrast, past settlements with noncommercial services, including SoundExchange's recent settlement with CBI, are consistent with the current rate structure.

J. Definition of "Performance" - § 380.2

The regulations currently define royalty-bearing performances as all "instance[s] in which any portion of a sound recording is publicly performed to a listener by means of a digital audio transmission . . ." 37 C.F.R. § 380.2. The definition provides for only three narrow exceptions: (1) performances of sound recordings that do not require a license; (2) performances of sound recordings for which the service already has a license; and (3) "incidental" performances. *Id.* NAB proposes two additional exclusions:

1) performances that are "15 seconds or less in duration"; and
2) "second connection[s] to the same sound recording from someone from the same IP address."

[4] 218 average simultaneous listeners * 24 hours * 30.417 days/month = 159,140 ATH per month.

(*See* NAB's Proposed Rates and Terms, at 3.)[5] Both of these proposals significantly narrow the definition of "performance." These are inappropriate and unnecessary changes.

To support NAB's proposed exclusion of performances of 15 seconds or less, Steven Newberry testifies that "it doesn't make sense to charge a fee for a song the listener demonstrates by his or her actions that he or she doesn't want to hear." (Newberry WDT, at ¶ 34.) It certainly "makes sense" to me. From my perspective, it is a matter of basic fairness that owners be compensated anytime their music is used by a service to further its business. If services want to minimize their financial obligation for short performances, they should not allow their listeners to "skip" songs. If they instead opt to give their listeners the flexibility to skip songs, it would not be fair for them to escape the financial consequences of that business choice. In addition, I understand that Professor Rubinfeld's proposed rates were calculated based on the assumption that all performances – as currently defined – would be royalty-bearing. (*See* Rubinfeld WDT, at ¶¶ 212-217.) While I don't think NAB's testimony adequately explains why a change to the long-standing, established definition of "performance" is necessary, if the definition were to be narrowed, SoundExchange's rate proposal would have to be adjusted upward to account for this change.

NAB's second proposed change to the performance definition is also misguided. NAB offers testimony by Jean-Francois Gadoury of Triton Digital explaining that media players can sometimes connect to a stream twice, and that such re-connections could be erroneously counted as a second performance. (*See* Gadoury WDT, at ¶¶ 2-12.) NAB's proposal to exclude "second

[5] NAB proposes that a distinct set of terms be applied to broadcasters. SoundExchange opposes any such segmentation of the statutory license's rates or terms for the reasons explained in Professor Rubinfeld's testimony. It is worth noting that NAB models its proposed terms on the terms voluntarily negotiated by SoundExchange and NAB as part of their 2009 WSA settlement, not the terms that were established by the CRB.

connection[s] to the same sound recording from someone from the same IP address" appears to be aimed at addressing this issue. This is a solution in search of a problem. The current "performance" definition is already limited to transmissions "to a listener." 37 C.F.R. § 380.2. Accordingly, any re-connection made by the same listener's device due to a technical glitch would not be a second performance under the current regulations. Instead of solving a problem, NAB's proposed amendment would create one. Based on my conversations with individuals in SoundExchange's IT department, it is my understanding that more than one user could be using the same IP address if they connect to the internet from the same location, like a workplace. As a result, a "second connection to the same sound recording from someone from the same IP address" could be a performance to a second distinct listener. I see no reason to exclude such performances from the regulation's definition.

Pandora proposes its own alterations to the performance definition. (*See* Pandora Proposed Terms, at 3.) Mr. Herring testifies that the definition "should make clear that only those transmissions to users in the United States are properly compensable under the Section 112 and 114 licenses." (Herring WDT, at ¶ 37.) Given that there is nothing to suggest that the established definition is not working, the insertion of a geographical limitation is unnecessary. Moreover, to the extent that a licensee's activities in the U.S. implicate U.S. copyright rights, it should pay for the exercise of those rights regardless where its users are located. In addition, it is my understanding that geo-location technology is susceptible to inaccuracies. Pandora's proposed definition also unjustifiably strikes the parenthetical from the definition that explains that "the delivery of any portion of a single track from a compact disc to one listener" is one example of a "digital audio transmission." (*See* Pandora Proposed Terms, at 3.) This

parenthetical should not be removed. It offers an important clarification in the classical music context: each movement of a symphony is a distinct sound recording.

K. Definition of "Broadcast Retransmission" in § 380.11

Both iHeartMedia and NAB propose modifying the simulcast definition in the regulations that apply to broadcasters. (*See* iHeartMedia Proposed Terms, at 3 and NAB Proposed Terms, at 2.) I first want to reemphasize that broadcaster-specific regulations are unnecessary because it is SoundExchange's view that the same statutory license rates and terms should apply to all commercial webcasters. Accordingly, the regulations to be determined by the Judges do not need to specifically define simulcasts.

However, if simulcasts were to be defined in the regulations, neither iHeartMedia nor NAB offer a reasonable definition. The fundamentals of both services' proposals are the same. They seek to define simulcasts broadly to include programming in which up to 49% of the original broadcast programming has been replaced with other content. Broadening the definition in this way stretches the concept of a simulcast well beyond its true meaning and invites gamesmanship. Programming is either simulcast with a station's terrestrial over-the-air radio signal, or it is not, and simulcasts should be defined for purposes of the statutory license in a way that is consistent with this common-sense definition. At the point that 49% of the programming is no longer a simulcast of broadcast programming, any possible justification for treating the programming differently from other internet webcasting would cease to exist.

L. Sound Recording Performance Complement

iHeartMedia proposes adding language that would relax the sound recording performance complement. (*See* iHeartMedia Proposed Terms, at 2-3, 3-5.)[6] It looks to me like this proposal attempts to alter the scope of the statutory license. I'm not a lawyer, but I expect that SoundExchange will take the position that such changes are inconsistent with the relevant statutory provisions and cannot be made in the context of this rate-setting proceeding.

III. NAB's Other Proposed Terms

In the course of reviewing each of the services' proposed terms, it appears that NAB and NRBNMLC have included several proposed modifications to the current regulations that they neither mentioned in their testimony nor identified through a redline or otherwise highlighted in their Proposed Rates and Terms submissions. Without evidentiary support, the proposed changes should all be rejected out of hand, but I will also briefly address some of the changes I have identified to date that raise concerns. This is not to say that there are not other embedded, material changes in their rate proposals or proposed regulations (and the Judges should reject those as well), but it is certainly the case, in my view, that these proposals raise significant operational, administrative, and other concerns that I wanted to bring to the attention of the Judges for their consideration.

1. NAB offers an exceedingly broad definition of "Broadcaster" in its proposed § 380.11 that reaches not only broadcasters, but also any entities affiliated with broadcasters. (*See* NAB Proposed Terms, at 2.) Again, given that all commercial webcasters should be subject to the same rates and terms, a "broadcaster" definition is unnecessary. But if

[6] I will also briefly note that iHeartMedia's introductory statement relating to regarding *WTFD 105.1FM v. SoundExchange, Inc.*, No. 5:14-cv-00015-MFU-JCH has been rendered moot in light of that case's recent dismissal. (*See* iHeartMedia Proposed Terms, at 2.)

broadcasters were to be given their own rate category or terms, the broadcaster category would have to be carefully drawn to ensure that non-broadcasters could not strategically devise a means by which to opt in to the broadcaster rates. For example, it has been reported that Pandora bought radio station KXMZ-FM in Rapid City, South Dakota to lower its ASCAP royalties.[7] Non-broadcast webcasters should not be invited to do the same here. NAB's definition is far too broad.

2. NAB seeks to amend § 380.12 so that a minimum fee would only be due for each of a broadcaster's AM/FM radio stations, rather than for each of its individual channels. *See* NAB Proposed Terms at 4. This change would put the minimum fee dramatically out of proportion to SoundExchange's administrative costs given that SoundExchange averages costs of $11,778 per licensee. (*See* Bender WDT, at 17.) To allow broadcasters to operate multiple channels without any financial repercussions would also invite gamesmanship. Plus, the regulations already cap the total amount of minimum fees that any single broadcaster has to pay.
3. NAB adds a provision that would excuse broadcasters from reporting information about performances contained in programming provided by third parties and allow them to make "good faith estimate[s]" instead. (*See* NAB Proposed Rates and Terms, at 4.) Third-party programming can often constitute a substantial portion of broadcasters' programming. The only way to ensure that artists and owners are properly compensated

[7] *See* Glenn Peoples, Pandora Buys Terrestrial Radio Station in South Dakota, Aims for Lower ASCAP Royalties, Billboard (June 11, 2013), *available at* http://www.billboard.com/biz/articles/news/radio/1566479/pandora-buys-terrestrial-radio-station-in-south-dakota-aims-for.

is to require broadcasters to obtain the requisite reporting information from their third-party providers. (*See* Exhibit 1, SX Reply Comments, at 85-87.)

4. As in the notice and recordkeeping proceeding, NAB requests waiving the reporting requirements for small broadcasters. (*See* NAB Proposed Terms, at 6.) SoundExchange's opposition to a continued waiver for small broadcasters is set forth in our comments in that proceeding. (*See* Exhibit 1, SX Reply Comments, at 87-88.) NRBNMLC likewise requests an exemption. (*See* NRBNMLC Proposed Terms, at 6.) Its request cannot be countenanced because it fails to tie eligibility for the exemption to usage, and instead inappropriately proposes a broad exemption for all noncommercial services.
5. NAB and NRBNMLC both add language that would require audits to be "completed within 6 months of the date of the notification of intent to audit is serviced" on the licensee. (*See* NAB and NRBNMLC Proposed Terms, at 8-9.) Completion of an audit requires mutual cooperation and the provision of data by the licensee. These proposed amendments fail to account for the fact that the completion of an audit is just as dependent on the licensee as it is on the auditor, if not more so.
6. Finally, both NAB and NRBNMLC seek to amend the unclaimed funds provision to require that SoundExchange "use its best efforts to identify and locate copyright owners and featured artists in order to distribute royalties payable to them." (NAB Proposed Terms, at 9.) This is an unnecessary change—the existing standard is working. SoundExchange pays out hundreds of millions in statutory royalties each year; it has

demonstrated that it is capable of ensuring that performers and owners get paid.[8] (*See* Bender WDT, at 5.) Properly understood, at any given time SoundExchange's reported balance contains only a small portion of unclaimed royalties. By and large, the balance consists of money that is simply working its way through the payment and distribution pipeline in the ordinary course.

IV. Settlement with College Broadcasters, Inc.

As I reported in my direct testimony, SoundExchange has also reached a settlement with College Broadcasters, Inc. ("CBI"). Since that time, SoundExchange and CBI have filed a Joint Motion to Adopt Partial Settlement and comments in support of the settlement. Because the settlement is currently still pending before the Judges, I would like to take this opportunity to address some of the comments that were filed by third parties, including IBS and its member stations, WHRB, and NRBNMLC.

IBS's comments in opposition to the settlement are misguided. First, IBS's suggestion that CBI represents only a "minority of college broadcasters" appears wrong, or at least misleading. More than 500 stations have embraced the current noncommercial educational webcaster rates. (*See* Bender WDT Figure 2.) Second, in arguing that the CBI rates are not "proportional," IBS misstates the terms of the CBI and CPB settlements and improperly relies on a non-precedential agreement.

In its comments, WHRB points to two purported "drafting anomalies." In fact, they are no such thing. Its complaints about § 380.23(f)(4), for example, fail to understand that the

[8] NAB's amended provision also unjustifiably changes the amount of time that SoundExchange must keep the unclaimed funds from three years to five years. This change would interfere with SoundExchange's goal to efficiently distribute money to artists and copyright owners. Moreover, a three-year span is consistent with the Copyright Act's three-year statute of limitations. *See* 17 U.S.C. § 507(b).

amendments to the provision liberalize the current language and make compliance substantially easier, not more difficult. WHRB also complains that an ATH-based estimate of performances could be inaccurate. But licensees would not be required to use the ATH assumption to calculate their performances. Nothing constrains them from opting to account for their performances on a per-performance basis instead.

NRBNMLC offers comments on the settlement, not to voice opposition, but to make several points about the rates and terms it has proposed in this proceeding, including the ATH definition, the ATH threshold, and exemptions from reporting requirements. Because I have already discussed these proposed terms above, I will not address them again here. In any event, NRBNMLC comments provide no reason for the Judges to reject the CBI settlement.

V. Royalties for Featured Artist: Doria Roberts

Finally, I understand that recording artist Doria Roberts will be providing testimony in this proceeding. At her request, I have consulted her SoundExchange records to confirm her royalties. These records show that in the more than ten years between April 2004 and December 2014, Ms. Roberts earned a total of [redacted] in artist performance royalties, [redacted] in rights owner performance royalties, and [redacted] in rights owner ephemeral royalties. Those [redacted] in royalties are based upon a total of [redacted] performances. Of these performances, [redacted] were on Pandora.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: Feb 22, 2015

Jonathan Bender

Exhibits Sponsored By Jonathan Bender

Exhibit No.	Sponsored By	Description
SX EX. 056 - RP	Jonathan Bender	Ex. 1 - SoundExchange Notice and Recordkeeping Reply Comments

Before the
United States Copyright Royalty Judges
Library of Congress

In the Matter of: Notice and Recordkeeping for Use of Sound Recordings under Statutory License	Docket No. 14-CRB-0005 (RM)

REPLY COMMENTS OF SOUNDEXCHANGE, INC.

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September 5, 2014

Table of Contents

Before the
United States Copyright Royalty Judges
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In the Matter of:	
Notice and Recordkeeping for Use of Sound Recordings under Statutory License	Docket No. 14-CRB-0005 (RM)

REPLY COMMENTS OF SOUNDEXCHANGE, INC.

SoundExchange, Inc. ("SoundExchange") is pleased to provide these Reply Comments in response to the Copyright Royalty Judges' Notice of Proposed Rulemaking ("NPRM") concerning notice and recordkeeping issues under the statutory licenses provided by Sections 112 and 114 of the Copyright Act. *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 79 Fed. Reg. 25,038 (May 2, 2014).

I. Introduction

SoundExchange appreciates the Judges' attention to the issues raised in this proceeding. While notice and recordkeeping issues are highly technical, and have often been controversial, the Section 112/114 statutory license system depends upon having a coherent notice and recordkeeping system that results in timely delivery by licensees of useful data that accurately represents their usage of sound recordings. The Judges have time and again determined that SoundExchange should distribute statutory royalties to artists and copyright owners "based upon the information provided under the reports of use requirements." 37 C.F.R. § 380.4(g)(1); *accord* 37 C.F.R. §§ 380.13(i)(1), 380.23(h)(1), 382.4(d)(1), 382. 13(f)(1), 384.4(g). Thus, it is only when the "reports of use requirements" yield useful usage data that SoundExchange can best carry out the royalty distribution function that the Judges have entrusted to it.

In considering possible adjustments to the notice and recordkeeping requirements, the Judges should keep in mind the purpose of the statutory licenses and the role of reporting within the statutory license system. The statutory licenses do not exist for the benefit of artists and copyright owners. The statutory licenses are a deviation from the usual exclusive rights under copyright, and prevent artists and copyright owners from commercializing their works through the usual free market negotiations. Instead, the statutory licenses were intended "to create fair and efficient licensing mechanisms." H.R. Conf. Rep. 105-796, at 79-80 (1998). That is, relative to the usual requirement to obtain licenses on a negotiated basis, the statutory licenses provide licensees the significant benefit of being able to obtain the right to use all commercial recordings through a single process under terms (including, for this purpose, reporting provisions) determined by the Judges.

When the Section 114 license was first enacted, it assumed that licensees would account directly to the copyright owners of the works they used, just as would be the case under voluntary licenses. *See, e.g.,* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 342-43 (providing in Section 114(g)(2) that copyright owners would perform the function of allocating royalties to artists that SoundExchange now performs). However, services wanted a more convenient arrangement. To simplify the process of accounting for their usage "the Services urged the Office to designate a single Collective." *Notice and Recordkeeping for Digital Subscription Transmissions*, 63 Fed. Reg. 34,289, 34,293 (June 24, 1998). SoundExchange itself, and the current procedures for paying royalties and accounting through SoundExchange, are the result of those services' calls to make administration of the statutory licenses easier for them.

Under any license – voluntary or statutory – the licensee must inform the licensor about the use that the licensee makes of works subject to the license. This is because, as a general matter, only the licensee knows what it is doing in its service. Indeed, in voluntary licenses negotiated between digital music services and record companies, services are typically required to engage in more extensive reporting than that required by the notice and recordkeeping regulations. The technical details of such reporting, such as the specific data fields that must be provided and the delivery format, are routinely negotiated by the staff of licensors and licensees. With a voluntary arrangement, a licensor is generally able to process reports provided by services in a straightforward manner, because it receives copious, relatively high-quality data that it matches against only its own repertoire to account to its artists.

By contrast, the Judges and Congress have tasked SoundExchange with a daunting data processing challenge. Under the statutory licensing system, licensees have the privilege of using any commercial sound recording ever distributed. Thus, reports of use ("ROUs") identify a much broader range of recordings than would be covered under any voluntary license. And while SoundExchange expects to have good information concerning approximately 14 million known recordings when it completes its next database update this month, no matter how good that information is, only the licensee can tell SoundExchange which of those recordings it used, and how it used them. ROUs are the vehicle for licensees to provide that essential information. Matching the usage reported on ROUs to the repertoire known to SoundExchange (or, in some cases, using the reported usage to discover new repertoire previously unknown to SoundExchange) is the critical step that makes allocation of royalties to artists and copyright owners possible.

Unfortunately, ROUs are currently a weak link in the statutory royalty distribution chain. To be sure, some large commercial music services provide usage data of very high quality – such high quality that for some services, more than 99% (and sometimes very nearly 100%) of their lines of reported usage data can be automatically matched by SoundExchange to known repertoire. Not surprisingly, those services did not file initial comments this proceeding. Those services have made it a priority to try to report their usage properly and accurately, and recognize that SoundExchange's Petition sought relatively modest adjustments to the overall reporting regime.[1]

The problem is that the number of services providing high-quality data is small. Many other services report poor quality data, when they report data at all, and the broadcasters that have been so outspoken in this proceeding are among them. This is a much bigger problem than NAB/RMLC suggest in their comments. NAB/RMLC Comments, at 2, 17, 64. For 2013, approximately two-thirds of licensees required to deliver ROUs still have failed to deliver one or more required reports, and about one quarter of such licensees have not delivered any such reports at all. In 2013, lateness in delivering ROUs affected approximately $203 million in royalties (about 31% of statutory royalties), and ROUs that SoundExchange received late were, on average, delivered about 90 days late. For a small percentage of usage, ROUs are never received at all.

Even when licensees submit their ROUs, hopefully on time, the problems do not end there. Out of all of the useable ROUs received last year, an average of about 29% of the lines of

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[1] *See* Notice and recordkeeping for use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52,418, 52,420 (Oct. 13, 2009) ("the fact that many of the largest commercial Webcasters and other intensive users such as satellite radio have not filed comments in this proceeding clearly indicates an absence of controversy among more intensive users").

data ingested by SoundExchange could not be matched automatically to known repertoire, with the vast majority of the issues due to data quality problems.[2] Those lines of data correspond to about 23% of all statutory royalties received last year. Only by investing substantial resources in painstaking efforts to clean up licensee-provided data has SoundExchange been able to obtain and process data sufficient to distribute with reasonable accuracy and deliver royalty payments for all but a very small percentage of those payments. Notwithstanding that effort, the delay means that tens of millions of dollars of statutory royalties are held up for months, and in some cases years, in the process. SoundExchange, along with the artists and copyright owners it represents, believe that it is not good enough.

The proposals that SoundExchange made in its Petition were intended to represent relatively modest adjustments in the overall reporting regime to address specific observed problems and clean up a few historic anomalies. The 274 pages of comments filed by NAB/RMLC[3] vigorously oppose almost every proposal that SoundExchange made, and the 22 other comments filed by broadcasters and broadcaster groups likewise oppose many of SoundExchange's proposals. Broadcasters, however, accounted for almost 17% of total webcasting royalty collections in 2013 (almost 11% of total statutory royalties), and represent a

[2] New repertoire that is reported without an ISRC is not matched automatically. However, given that some services regularly maintain a match rate greater than 99%, SoundExchange believes that such new repertoire typically accounts for about 1% of the lines of data in ROUs.

[3] Parts of the comments filed by NAB/RMLC are styled as "declarations" by certain individuals. However, this is an "informal rulemaking" as that term is understood in administrative law, and accordingly, the NPRM solicited "comments." 79 Fed. Reg. at 25,038. Because this is not a "formal rulemaking," styling comments as "declarations" is unnecessary and confers upon those comments no special status. *Compare* 5 U.S.C. § 553 *with* 5 U.S.C. §§ 556 & 557. The Judges' rule at 37 C.F.R. § 350.4(e) also indicates that "[s]ubmissions signed by an attorney for a party need not be verified or accompanied by an affidavit." Accordingly, SoundExchange has not styled any part of its comments as a declaration. Counsel for SoundExchange have, however, made a sufficient inquiry to make the certification contemplated by Section 350.4(e).

disproportionate share of the few percent of statutory royalties that ultimately cannot be allocated based on usage. The thrust of the lengthy and numerous broadcaster comments is that they should not have to do the things that other licensees are already doing to provide the sort of high-quality data that enables timely and efficient distribution of royalties to artists and copyright owners. Instead, those broadcasters propose less comprehensive reporting of fewer data elements, and no meaningful consequences for non-reporting. That is not reasonable.

The Judges have consistently recognized that licensees' providing reasonable notice of the recordings they use is essential to the statutory license scheme. As the Judges have observed time and time again, "[b]efore [SoundExchange] can make a royalty payment to an individual copyright owner, they must know the use the eligible digital audio service has made of the sound recording." *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 73 Fed. Reg. 79,727, 79,727-28 (Dec. 30, 2008). Before responsibility for notice and recordkeeping regulations was transferred to the Judges, the Copyright Office observed that inadequate record keeping by licensees is simply "unacceptable." *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 69 Fed. Reg. 11,515, 11,516 (March 11, 2004). Then, just as here, the Office was confronted by embellished protests that, for some services, requiring accurate recordkeeping and notice would be "too great a burden." *Id.* at 15,521. The Office rejected those claims, however, explaining that even if some services were not presently capable of reporting data, they could reasonably be expected to make themselves capable:

> Transmitting a sound recording to the public is not something that accidentally or unknowingly happens. It takes a significant amount of decision making and action to select and compile sound recordings, and a significant amount of technical expertise to make the transmissions. It is not unreasonable to require those engaged in such a sophisticated activity to collect and report a limited amount of data regarding others' property which they are using for their benefit. While making and reporting a record of use is

> undoubtedly an additional cost of transmitting sound recordings to the public, it is not an unreasonable one.

Id. at 15,521 n.12. Almost 20 years after the enactment of the Section 114 license, and more than 15 years after its extension to webcasting, now is the time for broadcasters finally to do the things necessary to enable accurate and timely distribution of the statutory royalties they pay.

With that background, we turn to the specific issues raised in the NPRM and initial comments. Part II addresses the Joint Petition. Part III addresses the issues raised in SoundExchange's Petition. Part IV addresses new issues raised in the initial comments.

II. Joint Petition

The NPRM proposes modifying the definition of Minimum Fee Broadcaster in Section 370.4(b) to extend the sample-based reporting provisions in Section 370.4(d)(3)(ii) to a broader set of webcasters. 79 Fed. Reg. at 25,039-40. As SoundExchange explained in its initial comments, SoundExchange does not oppose that change, although it suggested some technical corrections and a more accurate term to refer to the expanded group of services. SoundExchange Comments, at 2-3 & n.2.

In their initial comments, noncommercial educational webcasters ("NEWs") ask for something much broader – incorporating in the notice and recordkeeping regulations their preferred parts of the terms in Section 380.23, which were the result of a settlement of the *Webcasting III* proceeding between SoundExchange and CBI. Specifically, the NEWs would like to include in the notice and recordkeeping regulations the outright reporting waiver and play frequency reporting provisions of Section 380.23(g), but not the late fee for ROUs provided in Section 380.23(e) or the server log retention provisions of Section 380.23(i). *E.g.*, CBI Comments, at 3-4, 6-8; KBHU Comments, at 1. NEWs should not be given their requested

special exemption in these regulations; their concerns are addressed directly in the terms to which CBI agreed.

There are just over 500 NEWs. Because they overwhelmingly pay only the minimum fee, NEWs in the aggregate pay only about $250,000 in annual royalties, or about 0.04% of 2013 total statutory royalty collections. In contrast to the other categories of broadcasters, the NEWs are largely amateur operations, and have a mission of educating their staff rather than necessarily reaching a large audience. The 20 initial comments in this proceeding from NEWs and representatives thereof – more than two thirds of the initial comments in this proceeding – say that NEWs have had difficulty reporting, and indicate that NEWs care very much about not having to provide reports of their actual usage. In fact, about 97% of NEWs have elected the reporting waiver of Section 380.23(g)(1). Before the reporting waiver, many NEWs either did not report at all, or did so poorly, requiring a disproportionate investment of SoundExchange resources to utilize the data they provided.[4] Moreover, while some NEWs pride themselves on the breadth of their playlists,[5] reporting their usage on a two-weeks-per-quarter sample basis does not allow distribution of royalties on a basis that takes into account the vast majority of such usage. While the provisions in Section 380.23 are less than ideal, and should not in any way be viewed as a model for handling pools of royalties paid by professional operations, they

[4] Other compliance issues with NEWs continue even with the waiver. For example, despite professing to rely on the statutory licenses, commenters KBHU, KNHC, WSLX and WSOU do not appear to have filed NOUs. *See* http://copyright.gov/licensing/114.pdf. And two of them (KBHU and WSLX) do not seem to have paid statutory royalties or otherwise interacted with SoundExchange in recent years. Despite professing or suggesting that they report usage on a sample basis, SoundExchange's records indicate that commenters Lasell College Radio and WGSU have purported to rely on the reporting waiver and have not actually provided ROUs in recent years.

[5] *E.g.*, WJCU Comments, at 4 ("WJCU Radio and many other NEWS offer highly diverse programming, meaning that tens of thousands of unique sound recordings may be broadcast in a single year in contrast to several hundred at a typical commercial music operation").

may well represent the best solution available at this time to the problem of distributing NEW royalties on a fair and cost-effective basis.

However, it is not fair for the NEWs to pick and choose their favorites from among the provisions of Section 380.23 that were negotiated by CBI and that have been in place for several years. SoundExchange hopes that it will be possible to reach an agreement to settle the *Webcasting IV* proceeding as to NEWs on a basis that would generally extend the relevant provisions of Section 380.23 and thereby moot the issues raised in the Joint Petition through 2020. If that happens, there would be no reason for the Judges to adopt the proposals in the NPRM based on the Joint Petition, and the Judges could revisit the question of reporting by NEWs based on a fresh record in five years. Otherwise, the Judges should either adopt the equivalent of all the relevant provisions of Section 380.23, by adopting SoundExchange's proposed late fee for ROUs (see Part III.E.2 of these comments) and proposed recordkeeping provisions (see Part III.G of these comments), or adopt only the changes to the definition of Minimum Fee Broadcaster proposed in the NPRM.

III. SoundExchange Petition

In this part of these comments, we review comprehensively all of the proposals raised in SoundExchange's Petition based on the initial comments concerning them. While we discuss these proposals separately, we cannot emphasize enough that each proposal should be understood in the overall context of the statutory license system, and that the various parts of the notice and recordkeeping regulations need to work together to yield accurate and timely usage information that can be matched to payments and known repertoire if artists and copyright owners are to be paid the royalties they are due. SoundExchange has proposed a package of changes designed to both require delivery of data that will permit automated matching of

reported usage in a higher proportion of cases and provide meaningful incentives to comply with reporting requirements (as well as to adjust various details of the regulations). Broadcasters have suggested diluting the data delivery requirements and weakening the incentives to comply. The Judges should adopt SoundExchange's proposals, subject to the handful of modifications suggested herein in response to the comments of others.

A. ROU and SOA Consolidation, Matching and Identification

1. Consolidation and Matching

SoundExchange proposed a commonsense package of changes to the notice and recordkeeping regulations to enable SoundExchange more efficiently and effectively to match reported usage to royalty payments.[6] In particular, SoundExchange proposed that usage be reported at the enterprise level if feasible, and that in any case there be a one-to-one relationship between the scope of usage reported in an ROU and statement of account ("SOA") unless SoundExchange and the licensee agree otherwise. SoundExchange also proposed clarifying that licensees providing services in multiple rate classes must provide separate ROUs for each different type of service. Petition, at 6-8. Relatedly, SoundExchange proposed that services use

[6] The initial comments in this proceeding illustrate the kinds of problems these proposals are intended to address. For example, Sandab Communications II, L.P. does business as Cape Cod Broadcasting and owns radio stations WQRC, WKPE, WFCC and WOCN. NAB/RMLC Comments, Exhibit H ¶¶ 1-2. It has filed separate notices of use identifying itself as Sandab Communications d.b.a. the various stations. http://copyright.gov/licensing/114.pdf. If it provided a payment or statement of account in the name of Cape Cod Broadcasting, it would not be immediately evident that it relates to Sandab Communications, or which station(s) were intended to be covered. Similarly, KSSU is the name of a NEW service provided by Associated Students, Inc. at California State University, Sacramento. KSSU Comments, at 1. Associated Students filed its notice of use under that name, http://www.copyright.gov/licensing/114.pdf, but commented in this proceeding under the name KSSU. If SoundExchange received payments or ROUs under the names KSSU or California State University, Sacramento, it would not be obvious that they should be assigned to the account of Associated Students.

consistent naming on their SOAs and ROUs, as well as account numbers when assigned by SoundExchange. Petition, at 8-10. These proposals were relatively noncontroversial.

Based on NPR's unique circumstances, NPR took exception to SoundExchange's proposal to favor consolidation of reporting at the enterprise level and require a one-to-one relationship between ROUs and SOAs. NPR Comments, at 10. Because of NPR's unique organizational structure and funding model, SoundExchange has had agreements with the Corporation for Public Broadcasting ("CPB") providing unique reporting arrangements for NPR stations. SoundExchange shares NPR's expectation that it will again be possible to reach agreement with CPB and/or NPR concerning its unique reporting arrangement. *See* NPR Comments, at 1. SoundExchange's proposal in this proceeding specifically contemplates and enables such flexibility, by (1) providing for consolidation to the enterprise level only "if feasible" (proposed Section 370.4(d)(1)); (2) contemplating agreements for other than a one-to-one relationship between ROUs and SOAs (*id.*); and (3) generally authorizing SoundExchange to agree with licensees concerning alternative reporting arrangements (proposed Section 370.5(g)). In view of these provisions, it is neither necessary nor appropriate for the Judges to write NPR's current reporting arrangement into generally-applicable regulations or water down the reporting requirements for all licensees to encompass NPR's unique organizational and funding structure.[7]

NAB/RMLC generally accepted this group of SoundExchange proposals, although they took exception to some of the details. NAB/RMLC do not oppose a requirement that there be a one-to-one relationship between usage reported in an ROU and SOA, so long as there are no adverse consequences for failing to do so. NAB/RMLC Comments, at 69. In other words,

[7] *See* 74 Fed. Reg. at 52,419 ("We have no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.").

NAB/RMLC appears to take the position that the Judges are welcome to adopt this requirement, provided that broadcasters are free to ignore it with impunity. Because NAB/RMLC refer to "discrepancies" in "performance counts," *id*, perhaps they just did not understand the proposal. As proposed Section 370.4(d)(1) states, the proposed new requirement is that the ROU and SOA match in the sense of covering the same service offerings, channels or stations. So understood, there is no reason broadcasters need extraordinary relief from this provision. In contrast to immaterial errors in a name (see below), which could occasionally happen inadvertently and would have no consequence for processing of royalty payments, determining consolidation of SOAs and ROUs is a conscious corporate policy decision concerning the design of a business process that must be repeated month after month. Deviations from such a policy and processes should not happen inadvertently. Furthermore, having multiple SOAs associated with one ROU or multiple ROUs associated with one SOA has real operational consequences for SoundExchange. *See* Petition, at 6-7. SoundExchange's proposal provides licensees significant discretion in determining how they wish to consolidate their reporting. To enable that, we ask only that broadcasters consolidate their stations' usage the same way for purposes of both the ROU and SOA. NAB/RMLC do not seem to dispute that it is reasonable to expect licensees to figure out business processes to do that. Once they do that, it is reasonable to expect that licensees will follow their own business processes. NAB/RMLC have not provided any explanation that would justify making this requirement purely hortatory, so the Judges should adopt the proposed requirement.

NAB/RMLC also do not object to the principle that licensees that provide services in multiple rate classes should provide separate ROUs for each different type of service, "provided that submission of separate reports actually is necessary for SoundExchange to allocate and

distribute royalties." NAB/RMLC Comments, at 70. As a practical matter, SoundExchange does need separate ROUs, and licensees provide them today. Although NAB/RMLC argue that separate ROUs should not be required when a licensee has services subject to multiple rate classes and those services have identical playlists, that argument is not persuasive. There are only a handful of licensees that provide multiple services subject to different rate structures.[8] Those licensees would not typically have exactly the same channel lineup and playlists on the different services. Even if such licensees were to have identical playlists, they may have different reporting requirements, and they are virtually certain to have different usage (total performances or aggregate tuning hours) for each different service in a given month. Even in the most fanciful hypothetical in which the same ROU might satisfy applicable requirements for two services, it would not be – and no provider has suggested that it would be – burdensome to submit two copies of the same ROU. The Judges should thus adopt SoundExchange's proposal without NAB/RMLC's unnecessary proviso.

NAB/RMLC also do not oppose the requirement that licensees use consistent names across their SOAs and ROUs, so long as inconsequential errors such as the omission of "Inc." from a company name do not have adverse consequences for licensees. NAB/RMLC Comments, at 69. The purpose of SoundExchange's proposal concerning use of consistent names is to avoid SoundExchange's receiving ROUs and SOAs with different names that have no clear connection. It is not SoundExchange's purpose or intent to inflict penalties on a

[8] NAB/RMLC's comments do not justify their proposed proviso based on any identified problem for a broadcaster. Instead their proviso is grounded in what seems to be a description of Sirius XM's business. *See* NAB Comments, at 70 (referring to the licensee providing a business establishment service or an SDARS, two services that Sirius XM provides, and only Sirius XM provides an SDARS). However, Sirius XM did not take exception to the separate ROU requirement in its initial comments.

licensee that uses consistent naming but makes an immaterial error when doing so. The concerns of NAB/RMLC in this regard seem fully addressed by SoundExchange's discussion of inconsequential good-faith omissions or errors in the context of the late fees provision (*see* Part III.E.2).

NAB/RMLC do not oppose SoundExchange's proposal to assign licensees account numbers, so long as those account numbers are provided at the enterprise level. NAB/RMLC Comments, at 68. SoundExchange would expect to assign account numbers at the enterprise level if the licensee consolidates its payments, SOAs and ROUs at the enterprise level, which SoundExchange has proposed as the preferred option. If a licensee elects not to consolidate its reporting to the enterprise level, SoundExchange would expect to assign separate sub-account numbers to distinguish the different reporting groups within the licensee's enterprise.[9] However, assignment of account numbers in such a situation is a small operational detail likely to affect very few licensees. It need not and should not be addressed in regulations; SoundExchange is prepared to work flexibly with licensees in such cases.

MRI does not take exception to SoundExchange's proposals, but proposes in addition that when an agent like MRI submits SOAs or ROUs, that the SOAs and ROUs identify the agent. MRI Comments, at 3-4. If MRI submits any SOAs or ROUs on behalf of licensees, it is welcome and encouraged to add its name to the documents it submits. At this time, however, it does not seem necessary to require that by regulation.

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[9] It is not apparent that NAB/RMLC disagree with this proposed treatment of licensees that do not consolidate their payment and reporting to the enterprise level. Their real concern seems to be that a licensee should not have to manage 500 individual-station accounts if it does not want to. NAB/RMLC Comments, at 68-69. SoundExchange also would much prefer to deal with licensees at the enterprise level than the individual station level.

2. ROU Headers and Category Codes

SoundExchange proposed modifying the file header specification at 37 C.F.R. § 370.4(e)(7) and requiring use of headers in ROUs. Petition, at 10-12. Inclusion of headers in ROUs would unambiguously identify the ROUs and their providers in a manner that cannot be separated from the ROU and reduce the effort required of SoundExchange and/or the licensee when a licensee submits an ROU with the columns out of order. Implementing use of headers would be trivial from an information technology perspective. Licensees preparing their ROUs with spreadsheet software could include their header information in the template they use. For others, the header information could readily be pasted into the ROU text file before transmission if not automatically generated by the system producing the ROU.

Only NAB/RMLC take significant exception to the use of headers. NAB/RMLC Comments, at 72-76. NAB/RMLC devote most of their discussion of headers to reciting their view of the history of previous notice and recordkeeping proceedings relative to the use of headers in ROUs. However, this history is irrelevant to the question presently before the Judges, which is how reasonably to provide for notice of use of recordings under the statutory license now and for the future. SoundExchange's experience over the last decade convinces it that use of headers would materially improve processing of ROUs.

It is only toward the end of NAB/RMLC's discussion of headers that NAB/RMLC engage substantively with the current operational implications of SoundExchange's proposal. In essence, they make four arguments against use of headers, but each fails.

- NAB/RMLC argue that some of the proposed header information is currently required to be provided outside the ROU itself, in a separate email or cover letter (37 C.F.R. § 370.4(e)(3)(ii) and (iii)). This is true, but one of the operational problems

that SoundExchange is trying to solve is that, despite this requirement, licensees often do not provide this information outside the ROU. It seems more likely that licensees will provide this information if the templates and systems used to generate ROUs contain the header information (or a placeholder therefor) than if the staff responsible for reporting must remember to include this information in a separate email or cover letter. Furthermore, providing this information internal to the ROU makes it inseparable from the ROU. Just as the Judges' rules of procedure require that filings with the Judges have captions on the filings themselves, to ensure that they can be readily associated with the proper docket (*see* 37 C.F.R. § 350.3), the notice and recordkeeping regulations should require ROUs themselves to be identified. To avoid any duplication of effort, SoundExchange proposes eliminating the requirement to provide this information external to the ROU.

- NAB/RMLC argue that some radio stations do not use headers now, and it would be burdensome for them to do so in the future because some of the proposed header data changes from reporting period to reporting period. In fact, at least one major broadcaster licensee uses full headers now, and the examples cited to illustrate burden strain credulity. As described above, basic identification of the licensee and ROU, including a row count, is information licensees are already required to provide. Providing that information internal to the ROU rather than in an email or cover letter would not require more effort, and seems likely to require less effort. The checksum would need to be computed based on the data reported each month, but addition is a

simple arithmetic function easily performed by a spreadsheet or other computer software.[10]

- NAB/RMLC argue that audience measurement type, column headers and file parameters such as number of rows and checksum should be self-evident. But they are wrong as a factual matter. Audience measurement, whether performances or aggregate tuning hours, is just a number. And the ordering of data in an ROU is not as self-evident as NAB/RMLC imagine. Licensees pick and choose among data fields to include in their ROUs (either because the regulations provide options or because they have decided to do so anyway), and SoundExchange regularly receives reports with the columns out of order.[11] Having licensees tell SoundExchange what data they have included and how they have arranged it would be preferable to risking that SoundExchange will interpret their reported data improperly. Indeed, even if they do not use full headers, a number of licensees include in their ROUs a single-row

[10] The suggestion that licensees might not be able to transmit a file with 17 blank rows, NAB/RMLC Comments, at 76, is just silly. First, the whole point of the header is for it not to be blank. Second, a carriage return is a perfectly valid character in a text file.

[11] A recent ROU provided for Cape Cod Broadcasting, the subject of Exhibit H to the NAB/RMLC Comments, illustrates the kinds of issues that are presented in the messy real world of day-to-day operations. That ROU includes a row of column headers (though not other lines of the header contemplated by the regulations). The columns identified by Sandab include all the data elements contemplated by Section 370.4(d)(2), including alternatives, in the order provided therein, except that channel or program name appears between marketing label and actual total performances, rather than between aggregate tuning hours and play frequency. In the rows that follow, sound recording title information is included in the featured artist column; featured artist names are included in the sound recording title column; and neither ISRCs nor album titles and marketing labels are provided. While this ROU demonstrates that requiring headers is not a panacea when licensees do not match their data to the headers they have voluntarily provided, the larger lesson is that this proceeding is not an academic exercise in which it can be assumed that ROUs are provided in the idealized manner presented by NAB/RMLC.

header consisting of column identifiers.[12] The purpose of the number of rows and checksum is to allow SoundExchange to know when it has received all the data the licensee intended to report. Absent this information, SoundExchange would not know if it had received only an incomplete report.

- NAB/RMLC argue that requiring headers would allow SoundExchange to seek late fees for inadvertent minor errors. As explained in Part III.E.2, it is not SoundExchange's purpose or desire to seek late fees for inconsequential good-faith omissions or errors.

NPR's comments concerning headers primarily trumpet that its uniquely-customized reporting arrangement addresses some of the same issues as SoundExchange's proposal in this proceeding. NPR Comments, at 11. NPR's comments, however, have no bearing on the generally-applicable requirements for licensees that report different data in different formats and do not have its unique organizational structure and reporting arrangements. NPR also cautions that implementing SoundExchange's proposals would require time for NPR stations. However, they have time, because NPR's reporting format is governed by a special agreement through 2015 (and may well be after 2015).

CBI finds the inclusion of the checksum in the header confusing and inapplicable to its members. CBI Comments, at 8. CBI is right that the inclusion of the checksum is inapplicable to its members, because only a handful of NEWs actually report usage currently, and we expect that to continue, as described in Part II. In the case of the handful of NEWs that do report, and that report play frequency rather than performances or aggregate tuning hours, play frequency is

[12] *See* NAB/RMLC Comments, at Exhibit D ¶ 6 (Beasley includes "identification of the reported data fields"). SoundExchange has observed such headers in the ROUs of other commenting broadcasters as well.

the column that would be totaled to derive the checksum. That column easily could be totaled with the spreadsheet software referred to in the various NEW comments.

None of the comments filed by others appears to address the subject of category codes. As described in SoundExchange's Petition (at 14-15), if the Judges make the changes described above concerning consolidation of ROUs, matching ROUs to SOAs, and use of account numbers, SoundExchange believes that the concept of category codes can be dropped from the notice and recordkeeping regulations. If the Judges do not make those changes, category codes would continue to play a useful role in royalty distribution, and the Judges should provide a mechanism to ensure that the category code list is always up to date. Petition, at 14-15.

3. Direct Delivery of Notices of Use

SoundExchange proposed requiring licensees to send copies of their notices of use ("NOUs") to SoundExchange when they file them in the Copyright Office. Petition, at 12-14. This proposal responds to a very basic problem. NOUs contain information useful for the orderly flow of reporting and royalties. That is why the Judges and the Office before them have always required licenses to file NOUs. However, there is little point in collecting the information sought in NOUs if that information is unavailable to the people who need to use it – and principally that is SoundExchange.

The Office has generally been helpful in providing NOUs to SoundExchange. It sends batches of NOUs to SoundExchange once per month by email once it has received a check for the proper filing fee, the check has cleared, and the Office has resolved any issues with the filing. However, these deliveries are sometimes delayed when (1) waiting for a check to clear causes delivery of an NOU to slip into the next month, (2) the Office has had issues (such as a payment problem) that cause delivery of an NOU to slip for a month or more, or (3) staff turnover or other

issues in the Licensing Division have caused it to miss deliveries. As a result, SoundExchange has sometimes been able to access NOUs only after repeated requests or months of delay. From time to time, SoundExchange has discussed with Copyright Office staff whether SoundExchange could pull new NOUs more frequently itself, but that has not been practicable, primarily due to the way NOUs are filed in the Licensing Division.

If the Judges wish to have a system in which royalties are promptly and properly processed, that system should not depend upon a flow of NOU information that is slow and has at times been incomplete and irregular. SoundExchange is open to fixing that problem by means other than what it proposed. However, if the Judges choose not to address that problem, they should understand that they are choosing to implement an unreliable system that risks delaying the orderly flow of reporting and royalties.

Against that backdrop, NAB/RMLC oppose direct delivery of NOUs, but do not have any useful suggestions to address the underlying problem. NAB/RMLC Comments, at 80-82. First, NAB/RMLC suggest that SoundExchange's request should be denied unless SoundExchange undertakes to make NOUs available to the public. MRI makes a similar suggestion. MRI Comments, at 4. However, this is a solution in search of a problem. We are not aware of demand for NOUs by anyone other than SoundExchange, and whatever public demand for NOUs there might be is served by the Licensing Division. It makes no sense to impose an unnecessary and duplicative public records function on SoundExchange as a condition to addressing the genuine problem of getting NOUs to SoundExchange in the first place.

Then, NAB/RMLC question SoundExchange's need for the information contained in the NOUs on the theory that similar information is supposed to be contained in ROUs. However, NOUs have always done more than formalize a license's choice to rely on the statutory licenses.

NOUs alert SoundExchange to expect reporting and payments from a new licensee; allow it to set up a new licensee account; and provide a way for SoundExchange to contact the licensee to explain the requirements of the statutory license and how to submit payments, SOAs and ROUs, and to follow up if reporting and payment are not forthcoming, or are not clearly identified when received. While NAB/RMLC do not propose eliminating NOUs, they are essentially arguing against the principal purpose of NOUs. If the Judges wish to implement a reliable system for the orderly processing of reporting and royalties, they should not relegate NOUs to the files of the Licensing Division while leaving SoundExchange to guess that an ROU that cannot readily be matched to a known licensee is an ROU from a new licensee.

NAB/RMLC suggest that if SoundExchange wants NOUs it should go to the Copyright Office to get them. However, as explained above, the problem is not SoundExchange's ability to communicate with the Office or its willingness to visit the Office if necessary, but establishing a reliable and timely flow of data from the Office.[13]

Finally, NAB/RMLC reiterate their refrain that any requirement is an excuse for SoundExchange to seek late fees for inadvertent minor errors. However, this proposal concerns delivery of NOUs, not ROUs, and so would not be reached by SoundExchange's proposed late fee provision. This purported concern is simply out of place.

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[13] WKNC similarly points out that a list of licensees that have filed NOUs is available on the Copyright Office website at http://www.copyright.gov/licensing/114.pdf, and suggests that the Office could provide updates to SoundExchange by means of an RSS feed. WKNC Comments, at 2. However, that list has not always been updated regularly; is in alphabetical order so new entries are not evident; and does not include most of the information contained in the NOUs, particularly the licensee's contact information. Receiving NOUs from the Office in real time by some kind of automated process would be welcome, but it is not in SoundExchange's power to make that happen.

The template comments filed by the various NEW commenters say that they "feel" direct delivery of NOUs is unnecessary and likely to be overlooked. *See, e.g.*, KBCU- Comments, at 2; WSDP Comments, at 2. It may well feel unnecessary for them to provide the information contained in NOUs – they, after all, are not in a position where they have to figure out how to properly account for royalties they receive from payors they have never heard of. It must be remembered that filing an NOU is, for most services, a one-time event. While a few commenting NEWs do not appear ever to have filed an NOU, most of the NEWs expressing concerns about this requirement will probably never file an NOU again. When webcasters do file an NOU, an appropriate instruction on the NOU form and/or the licensee section of SoundExchange's website indicating that a copy should be sent to SoundExchange should be sufficient to allay any concerns about overlooking the requirement.[14]

B. Flexibility in Reporting Format

1. Certification/Signature Requirements

SoundExchange proposed an amendment to Section 370.4(d)(4) to allow an ROU certification to accompany (rather than necessarily being included in) the ROU. SoundExchange also asks the Judges to eliminate the requirements in 37 C.F.R. § 380.13(f)(3) and § 380.23(f)(4) that SOAs bear a handwritten signature.[15] Petition, at 15-17; SoundExchange Comments, at 5. NAB/RMLC support SoundExchange's proposal. NAB/RMLC Comments, at 68.

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[14] The template educational webcaster comments also indicate that online submission of NOUs with a credit card payment would solve a "problem" for them. It is not clear what this problem is for an educational webcaster that has already filed its NOU. However, the Office's choices about how to receive NOUs and the applicable filing fees do not seem relevant to the issue of how to reliably get NOUs from the Office to SoundExchange.

[15] The handwritten signature requirements in 37 C.F.R. § 380.4(f)(3) and 384.4(f)(3) have been eliminated since the filing of the Petition. 79 Fed. Reg. 23,102, 23,129 (Apr. 25, 2014) (amending 37 C.F.R. § 380.4(f)(3)); 78 Fed. Reg. 66,276, 66,278 (Nov. 5, 2013) (amending 37 C.F.R. § 384.4(f)(3)).

CBI supports this proposal, but only if a typed signature is a sufficient electronic signature. CBI Comments, at 9. Similarly, SCAD Radio expresses concern about this proposal based on a lack of understanding of how to use an electronic signature. SCAD Radio Comments, at 2. However, SoundExchange's proposal would not require any licensee to use an electronic signature. While SoundExchange hopes that licensees will find it convenient to sign and submit their SOAs electronically, licensees that do not wish to do so could continue to provide SOAs that have a handwritten signature as they have been required to do all along. Moreover, a typed signature may well constitute a legally sufficient electronic signature.[16] In any event, SoundExchange would provide appropriate instructions for electronically signing and delivering SOAs when it makes that functionality available. The proposed change simply removes an unnecessary impediment to use of electronic signatures where desired. It need not be feared by NEWs.

2. Character Encoding

SoundExchange proposed modernizing the character encoding requirements in the notice and recordkeeping regulations to provide more options for reporting and to facilitate more accurate distributions of royalties.[17] In particular, SoundExchange proposed (1) allowing licensees to choose an appropriate encoding format, with a preference for the UTF-8 encoding

[16] *See* 15 U.S.C. § 7006 (defining an "electronic signature" as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record").

[17] Character encoding is the manner in which letters, numbers, punctuation marks and the like are represented as 1s and 0s for purposes of processing by a computer. There are many different systems for character encoding. ASCII is probably the most limited, because it is capable of representing only 128 characters: the letters A-Z and a-z, the numbers 0-9, and some basic punctuation marks and control codes. The UTF-8 format allows encoding of more than an additional million characters, including non-Roman alphabets and diacritical marks, and so can support every system of writing in a way that ASCII just does not. Petition, at 17-18.

format if feasible, and (2) requiring licensees to identify the character encoding format they choose to use in the ROU header. Petition, at 17-18.

SoundExchange's analysis indicates that licensees – including broadcasters – regularly provide ROUs encoded in non-ASCII formats, including UTF-8. In connection with the preparation of these Reply Comments, SoundExchange examined ROUs from a selection of 30 webcasters consisting mostly of broadcasters, and found that only 20 of the ROUs were readable in ASCII format.[18] That is not surprising, because character encoding is not something that ordinary computer users focus on, and the long-term trend has been for systems increasingly to default to non-ASCII character encoding formats. SoundExchange can process an ROU using almost any character encoding format, but strongly prefers that licensees use UTF-8 because it can encode any character, including characters from non-English languages that commonly appear in track and album titles and artist names. SoundExchange has recently implemented functionality in its system for ingesting ROUs that automatically tries to identify the character encoding format for each ROU so that it can be read without error. That functionality makes the licensee's identification of the character encoding format it used (item 2 above) less important than it was at the time SoundExchange filed the Petition, although the identification is still desirable to avoid errors and to account for situations in which a licensee chooses a more obscure format.

NAB/RMLC does not object to permitting use of the UTF-8 encoding format, but opposes SoundExchange's proposed preference for that format. NAB/RMLC Comments, at 83-84. NAB/RMLC's opposition to SoundExchange's preference for UTF-8 is puzzling, both

[18] Some of those may have been written in non-ASCII formats, but were nonetheless readable as ASCII files because they used a format backward compatible with ASCII and did not use non-Roman characters.

because choosing among character encoding formats is not typically difficult and because the essence of SoundExchange's proposal is that licensees should be able to choose the character encoding format they use. The purpose of the preference for UTF-8 is simply to steer licensees that can readily choose among character encoding formats toward a format that supports every system of writing, rather than one that is only capable of representing the Roman alphabet. SoundExchange doubts that broadcasters are as committed to ASCII as NAB/RMLC's comments indicate, because, for example, it appears to SoundExchange that Clear Channel, CBS and Univision use UTF-8;[19] Cox uses ISO 8859-1;[20] and Entercom uses Windows-1252. However, if there are broadcasters using ASCII (or some other format) that would need to make a material effort or incur a material expense to change, SoundExchange's proposal is designed to allow them to continue in their present course of conduct. No broadcaster should feel that an option is being "suddenly pulled out from under them" by SoundExchange's proposal.

Various individual webcaster commenters seem similarly confused by SoundExchange's proposal. WSOU agrees with SoundExchange concerning the limitations of ASCII, but expresses concerns about its not knowing the technical specifications of UTF-8 before finding comfort in the flexibility provided by SoundExchange's proposal. WSOU comments, at 4. Its final point is the right one. If WSOU submitted ROUs, it would likely be easy for it to choose to do so in UTF-8 format without understanding the technical details of how UTF-8 is implemented. But if not, it could choose an alternative format. The Blast FM characterizes the change to UTF-8 as a "hassle," The Blast FM Comments, at 1, but likewise would not need to

[19] Univision's choice of UTF-8 is appropriate given the use of diacritical marks in the Spanish language, which is used to identify much of the repertoire Univision uses.

[20] While Cox "identified a need to continue to use ASCII" to assure compatibility with the systems it uses to generate ROUs, NAB/RMLC Comments, at Exhibit C ¶ 8, it appears to SoundExchange that those systems are not actually generating ROUs in ASCII format.

change if that is really the case. KUIW opposes SoundExchange's proposal, but because it "may not have the students to do any kind of input." KUIW Comments, at 2. However, if KUIW were required to provide ROUs, the character encoding format for its ROU output file would have nothing to do with the amount of data entry involved. By contrast, Lasell College Radio and WJCU seem to understand SoundExchange's proposal, and so support it. Lasell College Radio Comments, at 2; WJCU Comments, at 2.

CBI argues that NEWs should be able to use their choice of character encoding format, but should not be required to tell SoundExchange which format they used. CBI Comments, at 9. This point is largely academic, because almost no NEWs provide ROUs now, and we expect that to continue, as described in Part II. Moreover, to the extent NEWs prepare their ROUs using Excel software and SoundExchange's template, that template will be configured to make it easy for licensees to use Excel to generate a UTF-8 output file (assuming the Judges adopt SoundExchange's character encoding proposal).

3. XML File Format

SoundExchange proposes to make XML (Extensible Markup Language) a permissible (not mandatory) alternative file format for delivery of ROUs. Petition, at 19. Most of the comments do not address this proposal. The discussion of this proposal in the NAB/RMLC Comments is confusing because it is combined with its discussion of the character encoding format. NAB/RMLC comments, at 83-84. The encoding of characters and the formatting of files are distinct concepts.[21] However, because NAB/RMLC say use of XML should be optional,

[21] A file is a collection of characters that are encoded in some format. The selection of a character encoding format and the selection of the format for the file in which the encoded characters will be delivered are separate and independent choices.

and that is exactly what SoundExchange proposes (*see* proposed Section 370.4(e)(2)), it appears that NAB/RMLC support SoundExchange's proposal in this regard.

C. Facilitating Unambiguous Identification of Recordings

1. ISRC, Album Title and Label

Under current regulations, PSS are required to include in their ROUs, among other information, the album title, the marketing label, and the International Standard Recording Code ("ISRC"), "where available and feasible." 37 C.F.R. § 370.3(d)(5), (6), (8). Other types of services may report either the ISRC or the album title and marketing label. Overwhelmingly they choose album title and marketing label, or do not report any of the three. Of the three, ISRC is the one data element with the most power to identify recordings accurately and unambiguously.[22] SoundExchange proposed that the PSS requirement be extended to the other types of services. Petition, at 21-23.

SoundExchange's proposal to require ISRCs "where available and feasible" reflects the simple fact, which the Judges have recognized, that "[b]efore [SoundExchange] can make a

[22] For example, the artist Sam Smith has released at least six different recordings of his popular song "Stay with Me":

Artist	Track	ISRC
Mary J. Blige | Sam Smith	Stay With Me [Darkchild Version]	GBUM71402190
Sam Smith	Stay With Me	GBUM71308833
Sam Smith	Stay With Me [Darkchild Version]	GBUM71401356
Sam Smith	Stay With Me [Live]	GBUM71402928
Sam Smith	Stay With Me [Shy FX Remix]	GBUM71401439
Sam Smith	Stay With Me [Wilfred Giroux Remix]	GBUM71401440

If a licensee reported to SoundExchange only that it used the recording "Stay with Me" by Sam Smith, the licensee might have used any of Sam Smith's six recordings of the song. Identifying the recording as from the album *In the Lonely Hour* would likely point to his main studio recording of the song, although his duet with Mary J. Blige was included as a bonus track on at least one version of that album. His other recordings of the song appear to have been distributed as digital singles and an EP, but not on an album. Under these circumstances, a licensee's reporting of the ISRC of the specific recording it used would unambiguously identify that recording in a way that reporting of artist name, track title and album title would not.

royalty payment to an individual copyright owner, [it] must know the use the eligible digital audio service has made of the sound recording." 73 Fed. Reg. at 79,727-28. When SoundExchange receives from a licensee in an ROU a line of usage data that cannot be matched to a known recording and/or payees with reasonable confidence, either because the data provided is incomplete or because the data, although complete, could describe any of several known recordings with different payees, SoundExchange has no means of knowing which recording the service actually used, and hence who should be paid for the use.

As described in Part I, an average of 29% of the lines of data in the ROUs ingested by SoundExchange last year could not be matched automatically to known repertoire, resulting in delays in distributing about 23% of statutory royalty payments. This indicates an extremely high level of missing or erroneous data for many services, given that for some services, fewer than 1% of lines of reported usage data could not be matched automatically. Many licensees have an average match rate under 50%. This is a particularly high number when one understands that SoundExchange's systems have long been designed to "learn" from the manual matching that SoundExchange does. That is, if a particular line of data reported by a licensee cannot be matched automatically, and SoundExchange then determines through a manual process that it likely was intended to identify recording *X*, SoundExchange's systems will thereafter automatically match that licensee's reporting of the same identifying information to recording *X*. To have 29% of lines not match automatically despite this feature of SoundExchange's systems requires a large and steady stream of new ambiguities and errors.

This low match rate reflects a mix of causes that are difficult to separate and quantify. To some extent, the set of data elements currently required by the ROU regulations is not sufficient to identify recordings unambiguously even when the required information is reported

completely, accurately and unambiguously. To an even greater extent, licensees fail to report the currently-required data elements completely, accurately and unambiguously. There are tens of millions of commercial recordings, and SoundExchange maintains over 90,000 artist accounts and about 30,000 copyright owner accounts. With numbers like that, there are a lot of names that sound a lot alike, particularly when abbreviated. For example, the label name "Boss" is reported for many tracks. However, Boss, Boss Productions, Boss Records and Boss Sounds are different copyright owner royalty recipients represented in SoundExchange's repertoire database. SoundExchange has also received reports of a Boss Entertainment, and other record labels have Boss in their names (*e.g.*, Big Boss Records). It appears that licensees sometimes use the single word "Boss" to identify at least several of these different entities.

In each case, the answer to these problems is the same. Generally reporting more data elements, even if some specific items are sometimes missing, inaccurate, indecipherable or ambiguous, will both tend to increase SoundExchange's automatic match rate and facilitate manual matching. Ten years ago, when it settled on the data elements presently required in ROUs, the Copyright Office "emphasized that they represent the minimum requirements," and that it was "*highly likely* that additional requirements will be set forth after the Office has determined the effectiveness of these interim rules." 69 Fed. Reg. at 11,518 (emphasis added).[23]

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[23] Given that the current requirements have always been viewed as the minimum necessary to enable proper payment of artists and copyright owners, the Judges should reject NAB/RMLC's suggestion to require reporting of only title and artist information, thereby reducing SoundExchange's match rate further. NAB/RMLC Comments at 23-35. Even NAB/RMLC concede that title and artist would enable unique identification of the actual recordings used only about 90% of the time. NAB/RMLC Comments, at 33. Moreover, the source on which they rely explains that 90% applies only to contemporary music, and that the number is 70-80% for older music. NAB/RMLC Comments, at Exhibit F ¶ 16. The statutory license system must pay artists and copyright owners a higher percentage of the time. Given the problems described above that

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Now that the volume of statutory royalty payments and reported usage has increased significantly, and is increasing rapidly, the Judges should elevate ISRC data beyond its status as an alternative reporting option in the "minimum requirements," to seek ROU data that would allow more rapid and accurate distribution. More frequent reporting of ISRCs is the one single thing that is most likely to increase matching, and hence proper payment of artists and copyright owners entitled to royalties. The time has come for other services to report ISRC when available and feasible, in the same manner the PSS have since 1998 and is common in direct license relationships.

Other commenters were deeply divided concerning this proposal. A2IM strongly supported it. Sirius XM, MRI, and apparently the many webcasters that didn't file initial comments in this proceeding accepted it. Broadcasters and their representatives opposed it.

a. Comments Accepting SoundExchange's Proposal

A2IM strongly supported SoundExchange's proposal. It explained that independent record companies release and own "the largest group of sound recordings," and often release recordings by artists that are less famous and less identified with specific labels than in the case of major label recordings. A2IM Comments, at 2. It advocated reporting of ISRC where available and feasible as the best solution for improving accuracy of royalty distributions to independent labels and their artists. *Id.* at 3.

Sirius XM accepted SoundExchange's proposal on the understanding that these data elements only would have to be provided when available. Sirius XM Comments, at 2. MRI indicated that it is "well aware" of the data matching issues that motivated SoundExchange's

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on average only yield a 71% initial match rate under the current regulations, delivery of fewer data elements would certainly drive that rate down significantly.

proposal, and cited various reasons for these problems. It suggested minor clarifications addressing the availability of these data elements. MRI Comments, at 4-5.

As SoundExchange emphasized in its initial comments, Sound Exchange has proposed the same standard that has been applicable to PSS for over 15 years, which requires services to provide an ISRC only when the ISRC is available and it is feasible for the licensee to provide it. SoundExchange Comments, at 6-7. Thus, SoundExchange agrees with the principle expressed by Sirius XM and MRI that licensees should not be required to provide any data element that does not exist for a particular recording. SoundExchange agrees with Sirius XM (but not MRI) that it is not necessary to add any additional language to the proposed regulations to achieve that result. For as long as there have been notice and recordkeeping regulations, there have been instances of the types cited by Sirius XM and MRI in which particular data elements do not exist for particular recordings. However, SoundExchange is not aware of anyone previously suggesting that the Judges' rules might require a service to provide information that does not exist, nor is it aware of any disputes in that regard. While SoundExchange is not opposed in principle to clarifying that proposition, it would have to be done with some care to avoid creating unwanted implications that the Judges previously or in other respects did require delivery of information that does not exist for particular recordings. This simply seems unnecessary.[24]

[24] Sirius XM did not advocate, but said it "would support" a requirement that SoundExchange make ISRCs available in a format convenient for each licensee. Sirius XM Comments, at 2. Since nobody has proposed such a thing, it is not necessary to say more. However, SoundExchange *is* exploring ways to make ISRCs more available to licensees, if the necessary investment of artist and copyright owner resources is justified by a greater promise that licensees might use them in reporting. Because Sirius XM's suggestion contemplates significant technical interaction between individual licensees and SoundExchange, that suggestion is more properly left for exploration on a voluntary basis between SoundExchange and services that have the capability and interest to pursue it.

b. Comments Opposing SoundExchange's Proposal

Broadcasters and their representatives vigorously opposed SoundExchange's proposal, and NAB/RMLC suggest that the Judges take a large step in the opposite direction by requiring reporting that is less comprehensive.[25] NAB/RMLC Comments, at 20-23, 46-48, 50-54. NAB/RMLC offer four reasons in support of their objection, all of which are unavailing.

First, they contend that ISRCs are not available. NAB/RMLC Comments at 36-39. The thrust of NAB/RMLC's argument is that "many sound recordings have no ISRC assigned."[26] NAB/RMLC Comments at 36. They assert that many "sound recordings made before 1989 often have no ISRC" and "many smaller independent labels and self-published artists do not obtain them." NAB/RMLC Comments at 36-37.

NAB/RMLC vastly overstate the degree to which sound recordings in commercial use have not been assigned ISRCs. While some record companies were slower than others to adopt the ISRC standard, and it may have been true a decade ago that many record companies did not assign ISRCs to their recordings, a very high proportion of commercial recordings have an ISRC assigned to them today, whether or not they were first released after adoption of the ISRC standard. As a label executive explained during a recent music licensing roundtable conducted by the Copyright Office, "on the label side we have been working with ISRC for about 20 years,

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[25] The new exemptions from reporting that NAB/RMLC propose are addressed in Parts IV.B-.D. To the extent that NAB/RMLC argue that it is too burdensome for them to figure out what album a recording came from, we note that statutory licensees are required by 17 U.S.C. § 114(d)(2)(C)(ix) to identify the album title to the listening audience as a condition of the statutory licenses.

[26] As part of this section of their comments, NAB/RMLC also suggest that where ISRCs are assigned, services do not necessarily have ready access to them. We address that as part of NAB/RMLC's second argument.

and I think we are pretty good about ISRCs assigned to all the products."[27] Apple – by far the dominant provider of digital music downloads in the U.S. – now requires that all sound recordings available in the iTunes store and its related services have an ISRC assigned to them.[28] That is a powerful incentive for a record company or distributor to assign ISRCs to its recordings, and iTunes offers a catalog of over 26 million recordings.[29] SoundExchange expects that with its next database update this month it will have ISRCs for about 14 million recordings.

Nonetheless, NAB/RMLC try to sow doubt about the availability of ISRCs by addressing at length the supposed state of ISRC use by independent artists. E.g., NAB/RMLC Comments, at 36 & Exhibit L. However, this has little or nothing to do with the actual operational concerns of broadcasters. In a more candid part of NAB/RMLC's comments they explain that broadcasters are "likely to play more 'mainstream' music, with playlists that are necessarily more limited than those of large multi-channel webcasters like Pandora." NAB/RMLC Comments, at 52. NAB/RMLC's professed concern for the unavailability of ISRCs for music by independent artists is just misdirection.[30] In fact, ISRCs are readily available for the vast majority of commercial recordings, and as described below, SoundExchange intends to facilitate their availability further.

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[27] Transcript of New York Roundtable in Copyright Office Docket No. Docket No. 2014-03, at 334 (June 23, 2014) (statement of Andrea Finkelstein, Sony Music Entertainment).

[28] *iTunes Music Provider: Frequently Asked Questions*, https://www.apple.com/itunes/working-itunes/sell-content/music-faq.html.

[29] http://www.apple.com/pr/library/2013/12/16BEYONC-Shatters-iTunes-Store-Records-With-Over-828-773-Albums-Sold-in-Just-Three-Days.html?sr=hotnews.rss

[30] NAB/RMLC also suggest that assignment of ISRCs is prohibitively expensive. NAB/RMLC Comments, at 36, Exhibit K ¶ 6. However, this is simply wrong as applied to anyone in the business of creating and marketing recordings. For a one-time (not annual) $80 registration fee, a label (including an artist) can receive a registration code enabling it to assign up to 100,000 ISRCs per year. https://www.usisrc.org/faqs/registration_fees.html. And a long list of approved ISRC Managers can provide individual ISRCs for artists or labels who do not wish to manage their own ISRC assignment. https://www.usisrc.org/managers/index.html.

Moreover, NAB/RMLC's argument that ISRCs are not available is also beside the point. As explained above, SoundExchange has proposed that services only be required to provide an ISRC when an ISRC is *available* and it would be *feasible* to provide it – as has been the case with the PSS for over 15 years. If a particular sound recording has no ISRC, the ISRC obviously would not be "available," and there would be no expectation that the service would provide one.

Second, NAB/RMLC argue that it would not be economically reasonable for broadcasters to try to associate ISRCs with the recordings they use, and *SoundExchange* should "associate ISRCs with other sound recording identifying information" instead.[31] To the extent this argument is about who has "the burden" of "looking up" ISRCs, it demonstrates a fundamental misunderstanding of the role of ROUs and of the problem that SoundExchange seeks to solve through the provision of ISRCs in ROUs. The purpose of ROUs is *not* to help SoundExchange learn the ISRCs of sound recordings that licenses report having used. Instead, the purpose is for SoundExchange to obtain from licensees accurate and unambiguous identification of the specific recordings that the licensee has used.

The identity of the specific recording that a licensee has used is not information "that SoundExchange already has collected." NAB/RMLC Comments, at 41. That is information that the licensee creates anew each month, and that is known to SoundExchange only when the licensee provides it to SoundExchange. The purpose of the notice and recordkeeping regulations is to prescribe how the licensee will communicate that information. *See* 17 U.S.C. § 114(f)(4)(A). ISRCs and other sound recording identification elements in ROUs are the way in

[31] NAB Comments at 39-41, Exhibit C ¶ 5 (suggesting that SoundExchange should match broadcaster-provided title and artist information to ISRCs), Exhibit F ¶ 17 (same).

which the licensee describes to SoundExchange the recordings it has used, and including ISRCs in ROUs would identify the recordings used with greater precision.

Embedded within NAB/RMLC's economic reasonableness argument is a question of how licensees feasibly acquire and report ISRCs. As a practical, operational matter, there are a variety of sources from which ISRCs are available. NAB/RMLC make much of various examples of promotional CDs with minimal identifying information and no perceptible ISRCs. *See* NAB/RMLC Comments, at 38. However, NAB/RMLC's own comments suggest that most broadcasters get most of their music from services such as PlayMPE, an online resource that typically provides a variety of associated metadata, including ISRC.[32] More generally, and as explained in the Petition, larger services that receive electronic copies of recordings from record companies and digital distribution companies should typically receive ISRCs as part of the accompanying metadata. To the extent services obtain recordings from commercial products, the ISRC generally should be encoded thereon, and when present, easily can be extracted with widely-available software tools. Petition, at 22-23. When a licensee does not have immediate access to ISRCs by one of those means, good ISRC databases are available on the internet.[33]

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[32] NAB/RMLC Comments, at Exhibit B ¶ 6-7 (Salem gets "the vast majority" of its new music from PlayMPE); NAB/RMLC Comments, at Exhibit E ¶ 5-6 (West Virginia Radio receives most of its music from music service providers, particularly Play MPE); NAB/RMLC Comments, at Exhibit G ¶ 6-7, 11 (referring to WDAC acquisition of recordings from PlayMPE, and implying that ISRC is often available for recordings obtained through PlayMPE); NAB/RMLC Comments, at Exhibit H ¶ 2 (Cape Cod Broadcasting obtains non-classical recordings mostly from PlayMPE and another service).

[33] For example, the U.K. society PPL provides a repertoire database with ISRCs at http://repsearch.ppluk.com/ARSWeb/appmanager/ARS/main and the French Société Civile des Producteurs Phonographiques provides a repertoire database with ISRCs at http://www.scpp.fr/SCPP/Accueil/REPERTOIRE/Catalogue/Choix_catalogue/BasePhonogrammes/tabid/81/language/en-US/Default.aspx. While operated by foreign societies, sound recording repertoire is highly internationalized, so these databases tend to have the ISRCs of recordings popular in the U.S. The thirteen year old SoundExchange testimony on

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The real issue here does not seem to be any shortage of ways for licensees easily to obtain ISRCs, but rather that many broadcasters have chosen not to store in their internal databases ISRCs that are available to them.[34]

SoundExchange anticipates that it will be able to provide ISRCs to interested services, either by offering them an ISRC search capability for recordings in its repertoire database or supplying them ISRCs that are missing from their ROUs (when the recordings can be identified in SoundExchange's repertoire database with reasonable confidence from other available information including the album title and marketing label name).[35] Of course licensees will still need to identify the particular recordings they use in their services. However, this will provide yet another means for any licensee readily to obtain ISRCs for recordings in its library.

As a result of the foregoing, SoundExchange believes that it generally should be feasible for licensees to acquire ISRCs and include them in their reports of use. However, if not, its

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which NAB/RMLC relied for the proposition that ISRC information is not publicly available is simply out of date. *See* NAB/RMLC Comments, at 39.

[34] *See, e.g.,* NAB/RMLC Comments, at Exhibit B ¶ 7 (available data needs to be copied to another database); NAB/RMLC Comments, at Exhibit E ¶ 10 (West Virginia Radio's database has not been configured to store ISRC); NAB/RMLC Comments, at Exhibit H ¶ 6 (Cape Cod Broadcasting does not capture related metadata). In arguing that ISRCs are unavailable, NAB/RMLC rely heavily on a statement provided by Rusty Hodge of SomaFM.com. NAB/RMLC Comments, at 36-39. However, what Mr. Hodge says is that SomaFM has not "stored" ISRCs for most of the recordings in its database. NAB/RMLC Comments, Exhibit K ¶ 5. Mr. Hodge adds that ISRCs can be lost in file conversion. *Id.* ¶ 7. That is to say, services do not retain ISRCs that are provided to them.

[35] Like Sirius XM, NAB/RMLC allude to the possibility of SoundExchange "decid[ing] someday to make its database available for services to use" or even "the Judges mandat[ing] such disclosure." NAB/RMLC Comments, at 41. While SoundExchange intends to make its repertoire database information (including ISRCs) available to services, a *requirement* that SoundExchange make its database available would be inappropriate. As RMLC's counsel Mr. Greenstein explained when he was representing SoundExchange last time such a suggestion was made, "[t]he CRB lacks the authority to expropriate SoundExchange's database for the benefit of licensees." Reply Comments of SoundExchange, Inc. in Copyright Office Docket No. RM 2005-2, at 25 (Sept. 16, 2005).

proposal is designed to provide flexibility in this regard. SoundExchange has only proposed that licensees be required to provide an ISRC when the ISRC is *available* and it is *feasible* for the licensee to provide it. This limitation has been part of the reporting regulations for the PSS for 15 years. Our understanding is that when the Judges required the PSS to provide ISRCs only when feasible, the Judges meant to indicate that licensees would not need to do that which is commercially impracticable. That language seems entirely sufficient to address the issues of "small services with few staff and limited resources" as to which NAB/RMLC profess concern. NAB/RMLC Comments, at 40.[36]

Third, NAB/RMLC contend that it would be unreasonable to expect licensees to provide ISRCs because SoundExchange and the RIAA "strongly opposed" mandating the provision of ISRCs in a separate Copyright Office proceeding that relates to an entirely different issue. NAB Comments at 41-42. The Judges should not be persuaded by their attempt to take prior comments made by SoundExchange and the RIAA out of their context.

The statements referred to were made in response to a Notice of Inquiry in which the Copyright Office sought advice on how to reengineer its platform for recording documents related to copyrighted works. *See Strategic Plan for Recordation of Documents,* 79 Fed. Reg. 2696 (Jan. 15, 2014).[37] The Office sought comments on, among other things, "whether it should adopt incentives or requirements with respect to the provision of standard identifiers" and

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[36] The cumulative comments provided by NEWs say that they are "very relieved" by the qualifier "if feasible." *E.g.*, KNHC Comments, at 2. CBI asserts that ISRC reporting by NEWs "is rarely feasible." CBI Comments, at 9. While few NEWs actually report usage at all, they are correct that SoundExchange's proposal would not require them to report by ISRC when that is not feasible. NPR also objects to this proposal. NPR Comments, at 12-13. However, given its special reporting arrangement, this proposal would not apply to NPR until 2016, and reporting arrangements for the period after 2015 likely will be a matter of discussion between the parties.

[37] *Available at* http://copyright.gov/fedreg/2014/79fr2696.pdf.

whether such provision "would aid in uniquely identifying affected works and in linking Copyright Office Catalog information about works to other sources of information about such works." *Id.* at 2699. SoundExchange took the position that "the Copyright Office *should* facilitate the collection of industry-standard unique identifiers, such as ISRCs." Comments of SoundExchange, Inc., in Copyright Office Docket No. 2014-1, at 4 (Mar. 15, 2014) (emphasis added).[38] SoundExchange added:

> ISRCs have become the standard within the recording industry to identify tracks. Record labels use ISRCs to identify their recordings and incorporate them into the metadata of their recordings that they provide to their digital partners. As examples, Apple's iTunes store requires an ISRC for each sound recording in order to make that recording available for sale to the public, and SoundExchange collects ISRCs from sound recording copyright owners in order to identify accurately their recordings for the purposes of distributing streaming royalties properly. Likewise, digital music services frequently report ISRC information to sound recording copyright owners when they report their usage under direct licenses in order to identify the sound recordings they have streamed.

Id. SoundExchange further explained that, although the Copyright Office should seek to collect ISRCs at recordation, it would be unworkable to make collection of ISRCs *mandatory* for the purpose of recordation because a single copyrighted work subject to recordation may have multiple sound recordings, each with a unique ISRC. *Id.* at 4-5 & n.3. The RIAA offered similar observations. *See* Comments of the Recording Industry Association of America, Inc. in Copyright Office Docket No. 2014-1, at 10 (Mar. 14, 2014) (encouraging the use of identifiers, such as ISRCs, "on a voluntary basis," but explaining that it would be unworkable to require

[38] *Available at* http://www.copyright.gov/docs/recordation/comments/79fr2696/SoundExchange.pdf.

them for recordation because "[e]ach individual version of the recording has a unique ISRC number").[39]

SoundExchange's and RIAA's comments that provision of ISRCs should not be a requirement for the recordation of copyrighted works were directed to unique issues relating to the statutory registration and recordation functions of the Copyright Office, and plainly do not reflect any lack of support for ISRCs by SoundExchange and RIAA. Nothing in these comments suggests that services should not use ISRCs to identify the tracks they report as used. Indeed, the feature of ISRCs that made their mandatory reporting unworkable for copyright recordation purposes – *i.e.* that ISRCs uniquely identify different versions of sound recordings, not copyrighted works – illustrates the reason that ISRCs would be useful here.

Finally, NAB/RMLC contend that providing ISRCs is not necessary, and would actually increase reporting errors. NAB/RMLC Comments, at 42-44. NAB/RMLC are correct that some recordings can be identified unambiguously with less information than others. However, as described above, the reporting that SoundExchange currently receives does not allow automatic matching of about 29% of reported lines of data (corresponding to about 23% of royalties). To the extent that SoundExchange received ISRCs, it would be able to match these lines, increasing the accuracy and speed with which these royalties can be paid to the proper artist and copyright owner.

NAB/RMLC's suggestion that inclusion of ISRCs in ROUs would increase reporting errors is disconnected from operational reality. SoundExchange receives a large amount of poor quality data, including from broadcasters. While ISRCs likely would be misreported occasionally, just like other identifiers, providing an additional data point – particularly one with

[39] *Available at* http://copyright.gov/docs/recordation/comments/79fr2696/RIAA.pdf.

the identifying power of ISRC – would certainly tend to increase matching rather than decrease it.

2. Classical Music

Reporting of usage of classical music has been a persistent problem, because a high proportion of usage is of recordings of a relatively small number of musical compositions, and services often have not provided data sufficient to identify which recording of a composition they used. To improve SoundExchange's ability to match reported usage of classical music to specific recordings and payees, SoundExchange proposed that services be required to identify the featured artist and the recording title with greater particularity than is clear from the current regulations. Petition, at 21, 23-24.

Sirius XM recognizes the difficulties presented by identification of classical recordings and so accepts SoundExchange's proposal with clarifications. It also suggests that the effective date of this requirement be delayed by 12-18 months.[40] Sirius XM Comments, at 2-3. It is not apparent to SoundExchange that Sirius XM's clarifications are necessary:

- Sirius XM suggests that the six fields of data sought by SoundExchange (three relating to identification of each of the featured artist and the recording title) should be required "only where available to the licensee." Sirius XM Comments, at 2. In Section 370.4(d)(2)(ix) of the proposed regulations attached to the Petition and NPRM, SoundExchange suggested qualifying all of these except the composer name and overall title of the work with the words "if any" or "if applicable," and it is not apparent how a service could use a classical recording under the statutory licenses

[40] Similarly, NPR indicates that "changing the field formats of reports of use is technology feasible, [but] it would take a substantial amount of time for NPR/DS to incorporate the changes into the current reporting system." NPR Comments, at 13.

without knowing the composer and work title.[41] To the extent that might be possible in some obscure set of circumstances, any concerns about penalties for failing to provide this information seem fully addressed by SoundExchange's discussion of inconsequential good-faith omissions or errors in the context of the late fees provision (*see* Part III.E.2).

- Sirius XM also said that it is "not clear from the Notice whether the new information is intended to be placed in the existing 'featured artist' and 'title' fields, or comprise new fields in the Reports of Use." Sirius XM Comments, at 3. In formulating its proposal, SoundExchange attempted to be as clear as possible that "these are new, separate fields for classical reporting," *id.*, by specifying in Section 370.4(d)(2)(ii) and (iii) of the proposed regulations that there is an exception to the requirement to provide featured artist and sound recording title "in the case of a classical recording," and including the new data elements as a separate item in Section 370.4(d)(2)(ix), reportable only "[i]n the case of a classical recording." While it seems unnecessary, SoundExchange has no objection to making that point even clearer.

SoundExchange also has no objection to providing a reasonable period for implementation of this requirement, and suggests that January 1, 2016 might be a reasonable and easily-administrable effective date for the requirement to provide expanded identification of classical recordings.

The broadcaster commenters take a very different approach from Sirius XM. NAB/RMLC call SoundExchange's proposal "[u]nnecessary and [u]nreasonable." NAB/RMLC

[41] Among other things, it is not apparent how a statutory licensee could comply with the requirement of 17 U.S.C. § 114(d)(2)(C)(ix) to identify the sound recording and album title to the listening audience without knowing this information.

Comments, at 44-46.[42] For its opposition, NAB/RMLC rely primarily on information provided by Cape Cod Broadcasting. NAB/RMLC Comments, at 45 and Exhibit H. However, Cape Cod Broadcasting illustrates the kinds of problems SoundExchange is attempting to address by its proposal. As Mr. Bone explains, Cape Code Broadcasting uses a radio automation system that has been customized by a software developer to meet its specific requirements, and Cape Cod Broadcasting has chosen to configure that customized system to store only work title and composer information. NAB/RMLC Comments, at Exhibit H ¶ 7. This phenomenon is illustrated in Exhibit H-1 to the NAB/RMLC Comments, which shows an example of a work identified in that system only as "Five Hungarian Dances" by Brahms.

As a result of Cape Cod's decision to configure its customized radio automation system to store only limited data, and its sloppy and inconsistent practices for capturing even that, a recent ROU provided for Cape Cod Broadcasting includes:

- In the featured artist column, generally names of musical works, or sometimes component parts or collections thereof (*e.g.*, "Allegro from Cello Sonata in g," "2 Gigues from Pieces de Clavecin," "Classic Cluster#5 (Sat,Bee,Br)");
- In the sound recording title column, generally names of composers, usually just the last name, and sometimes abbreviations of names, groups of composers or other

[42] Some of the comments provided by NEWs also "object" to SoundExchange's proposal. *E.g.*, KBCU Comments, at 3; *see also* CBI Comments, at 10. Some of the NEW commenters object to this proposal even though their comments suggest that they do not actually have "DJs at this time interested in playing classical music." *E.g.*, KSSU Comments, at 4; SCAD Atlanta Comments, at 3; SCAD Radio Comments, at 3. Because the NEWs generally do not seem to use classical music, and they do not report their actual usage when they do, their objections are entitled to no weight. Similarly, NPR calls some aspects of this proposal "unworkable" for its stations. NPR Comments, at 13. However, given NPR's special reporting arrangement, this proposal, if adopted, would not apply to NPR until at least 2016, and any implementation issues at that time likely would be worked out in discussions between the parties.

information (*e.g.*, "BACH," "SANZ, TARREGA, ALBENIZ," "TCHAIK,RACH,TCHAIK," "PUCCINI (Fine day,Belovdad,NessDr");[43] and

- No sound recording identifying information, such as featured artist, ISRC, album title or marketing label.

As the foregoing makes clear, all that Cape Cod Broadcasting has attempted to do is identify musical works, rather than specific recordings of those works, and in many cases it has not even done a very good job of identifying the musical works. This is contrary to the Copyright Office's clear instructions when it adopted the relevant regulations. 69 Fed. Reg. at 11,523-24. It should be apparent that such an ROU is useless for purposes of identifying the recordings actually used by Cape Cod Broadcasting and distributing royalties to artists and copyright owners.

An example illustrates the point. Antonio Vivaldi's *The Four Seasons* is one of the most popular pieces in the classical music repertoire. In just the single ROU described above, it appears that Cape Cod Broadcasting tried to report the use of six different recordings of movements from *The Four Seasons*, for which it identified the featured artist in a manner such as "Vl. conc. in F, Autumn R. 293 P. 257" or "Vl. conc. in g, Summer" (in each case the sound recording title is given as "VIVALDI," and no other identifying information is provided). This can in no sense be said to provide meaningful notice of use of specific sound recordings. See 17 U.S.C. § 114(f)(4)(A). This is also a significant problem. SoundExchange currently holds close to $700,000 in royalties that it cannot distribute because licensees have identified only the

[43] On some lines of the ROU, the fields are reversed or otherwise combined, so the featured artist column includes composers or groups of composers and sometimes the names of works as well, and the sound recording title column includes names of musical works or components or collections thereof.

composer and title of a musical work and not the specific sound recording used. SoundExchange has reached out to Cape Cod Broadcasting concerning ROU compliance on various occasions, including at least twice in roughly the last year concerning data reporting issues leading to extremely low match rates. However, those outreach efforts obviously have not led to a significant improvement in Cape Cod Broadcasting's reporting.

Even in the case of classical music reporting by a service that tries to comply with the applicable regulations, unambiguous identification of classical recordings presents special challenges. This is because the most popular classical musical works – the ones that are used most often by statutory licensees – have been recorded many times, often by performers known for their expertise with certain composers and works, and those recordings are often released and re-released by a small set of labels emphasizing classical music. And classical albums often are titled with the name of the musical work. For example, SoundExchange has database entries for about 500 different recordings of *The Four Seasons* that have been identified as used under the statutory licenses. The Decca label alone has released recordings of *The Four Seasons* by at least six different featured artist combinations.[44] One of the ensembles with a recording of *The Four Seasons* distributed by Decca is I Musici de Roma, an Italian chamber orchestra particularly known for its performances of works by Vivaldi. (There is also a separate ensemble called I Musici de Montreal.) Its recording of *The Four Seasons* distributed by Decca was originally recorded for and released on the Philips label (a corporate affiliate). I Musici de Roma

[44] (1) Janine Jansen; (2) I Musici/Federico Agostini; (3) Neville Marriner/Alan Loveday/Academy of St. Martin in the Fields; (4) Werner Krotzinger/Karl Munchinger/Stuttgart Chamber Orchestra; (5) The Academy of Ancient Music/Christopher Hogwood; and (6) Leopold Stokowski/New Philharmonia Orchestra.

has released a total of at least six different recordings of *The Four Seasons* on the Philips label,[45] and at least another two different recordings of *The Four Seasons* on other labels.[46] Philips has released at least nine other recordings of *The Four Seasons* as well, one of those featuring Felix Ayo, a violin soloist who also performed on two of Philips' I Musici releases of *The Four Seasons*[47] and has released other recordings of the work as well.

Against this backdrop, identifying a use of *The Four Seasons* by title and artist as NAB/RMLC proposes, NAB/RMLC Comments, at 33, 46, does not unambiguously identify a specific recording. If a use was identified by title and artist only as *The Four Seasons*/I Musici, the recording actually used could be any of at least eight different recordings by I Musici de Roma. If a use was identified only as *The Four Seasons*/Ayo, the recording likewise could be any of a number of different recordings. Adding the album title and label as contemplated by the current regulations does not substantially narrow the range of ambiguity when the album title is reported as *The Four Seasons* and the label is Philips.

As Sirius XM recognized, SoundExchange's proposed additional data fields for classical recordings are designed to provide the additional information necessary to allow proper payment. Three of these fields – composer, title of overall work, and title of movement or other constituent part of the work – are necessary to identify the relevant constituent musical work with precision.

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[45] (1) I Musici/Felix Ayo; (2) I Musici/Felix Ayo (again, in a different performance); (3) I Musici/Roberto Michelucci; (4) I Musici/Pina Carmirelli; (5) I Musici/Federico Agostini; (6) I Musici/Mariana Sirbu.

[46] (1) I Musici/Antonio Anselmi, on the Dynamic label; (2) I Musici/Francesco Renato, on the Fratelli Fabbri Editori label.

[47] (1) Felix Ayo/Vittorio Negri/Berlin Chamber Orchestra; (2) Arthur Grumiaux/Arpad Gerecz/Les Solistes Romands; (3) Henryk Szeryng/English Chamber Orchestra; (4) Viktoria Mullova/Claudio Abbado/Chamber Orchestra of Europe; (5) Thomas Wilbrandt/Christopher Warren-Green/Philharmonia Orchestra; (6) Jan Tomasow/Antonio Janigro/I Solisti Di Zagreb; (7) Gheorghe Zamfir; (8) Berdien Stenberg; (9) Raymond Fol Big Band.

While NAB/RMLC object to (and even ridicule) these requirements, this is, as described above, information that Cape Cod Broadcasting currently reports when it identifies *Spring* as having the sound recording title "Vivaldi" (the composer) and the featured artist "Vl. conc. in E, Spring R. 269 P. 241" (the overall work and part). Thus, for these three items, SoundExchange is not asking for an "incredible amount of information," NAB/RMLC Comments, at Exhibit H ¶ 8, but just proposing a format for reporting of information that Cape Cod Broadcasting tracks and reports currently.

As to the other three fields – ensemble, conductor and soloist(s) – the foregoing examples show that it is necessary to identify the combination of featured artists involved in this way to identify unambiguously the particular recording used. Reporting this information will require Cape Cod Broadcasting to do additional work, but reporting the data currently required by the regulations would require Cape Cod Broadcasting to do all or most of that work. The problem here is that for at least a decade Cape Cod Broadcasting has chosen not to store or provide any featured artist identifying information at all. It is time that it start to do so, and as it starts to do so, it should collect and report featured artist information in a way that will unambiguously identify the classical tracks it uses.

D. Reporting Non-Payable Tracks

Some licensees may not be required to make payments to SoundExchange for all the sound recordings they use in their services. For example, in the *SDARS II* proceeding, the Judges determined that use of certain categories of recordings would not be compensable under the royalty structure adopted in that proceeding, and provided for a corresponding adjustment of the payment amount owed by the service. *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 78 Fed. Reg. 23,054, 23,072-73 (Apr. 17, 2013); 37 C.F.R. § 382.12(d), (e). The SDARS rate regulations contain specific

provisions requiring identification of tracks for which a service claims a royalty exclusion. 37 C.F.R. § 382.12(h). In this proceeding, SoundExchange proposed language for Section 370.4(d)(2) operationalizing that requirement and extending it to other types of services. Petition, at 24-26. Sirius XM agrees that for services that pay royalties on a percentage of revenue basis, "this is necessary information," although it observes that this requirement should not extend to material such as voice breaks that may be logged in playlists. For services paying royalties on a per-performance basis, however, it asserts that "this is none of SoundExchange's business." Sirius XM Comments, at 3. NAB/RMLC likewise oppose this proposal. NAB/RMLC Comments, at 48-50. Various NEWs "strongly object" to this proposal, although it would not have any effect on them. *E.g.*, KBCU Comments, at 3; *see also* CBI Comments, at 10-11. MRI proposes procedures for addressing disputes if SoundExchange's proposal is adopted. MRI Comments, at 5.

Relatively few licensees have the financial incentive and purported wherewithal to administer licensing at the individual recording level so as to rely on the statutory licenses for some of their usage and direct licenses for other usage, or to exclude from their royalty payments use of particular tracks for which a license may not be required. For the NEWs and the vast majority of other licensees that do not rely on direct licenses or take royalty deductions for pre-1972 recordings or other tracks, SoundExchange's proposal would have no impact whatsoever. They would not be required to make exclusions that they have never made before and have no business reason of their own to make (*e.g.*, because they pay only the minimum fee). Instead, they would continue to report the same scope of usage they currently report (if any), and would flag none of the reported tracks as excluded.

For the relatively small set of usage-intensive licensees with the financial incentive and purported wherewithal to take royalty deductions at the individual track level, the reporting sought by SoundExchange is critical. The Judges adopted the current SDARS reporting requirement because in *SDARS II*, "[d]espite the Judges' requests," even a large, sophisticated service like Sirius XM was "incapable of providing the Judges with accurate data as to the identity and volume of" the recordings exempt from statutory licensing. As a result, the Judges found that "[r]easonable accuracy and transparency are required" to provide confidence that the appropriate payment is made. 78 Fed. Reg. at 23,073. If Sirius XM could not produce an accurate assessment of royalty deductions for use on its SDARS service in response to multiple specific requests from the Judges in the middle of a litigation with millions of dollars at stake, there is no reason to believe that the same systems and staff would do a better job of accounting for use on its webcasting service, or that other webcasters with fewer resources and less motivation would do a better job. Thus, the problem that the Judges identified in *SDARS II* applies equally to all services, whether they pay royalties on a percentage of revenue or per-performance basis. Absent reporting of which tracks services believe to be non-payable, SoundExchange has no practical means of determining whether artists and copyright owners are being properly paid for usage that is payable.

None of the commenters dispute the basic proposition that transparency is necessary to enable SoundExchange to ensure that it is receiving the proper compensation in the face of an inability of the part of services to distinguish accurately between payable and non-payable tracks. Rather, commenters have raised two arguments that challenge whether the Judges have the statutory authority to require reporting of non-payable tracks, neither of which is persuasive.

First, NAB/RMLC argue that their services should not be required to disclose tracks that they believe to be non-payable because the Copyright Act provides for "reasonable notice of the use of their sound recordings under" the statutory licenses, 17 U.S.C. §§ 112(e)(4), 114(f)(4)(A), and does not specifically "require[] reporting of sound recordings not subject to the statutory licenses." NAB/RMLC Comments, at 48-49. This observation is not responsive. Sections 112 and 114 do not identify any of the specific data items that licensees are required to report in ROUs. It is up to the Judges to determine what reporting is necessary to provide "reasonable notice" of services' use of sound recordings. As long as there is little reason to believe that services are capable of accurately distinguishing between those performances that are subject to the statutory license and those that are not, the only way to provide reasonable notice of use of sound recordings under the statutory license is to require services that rely on the statutory licenses for some of their usage, but not all, transparently to disclose what recordings they think they are using outside the statutory license.

Second, Sirius XM and NAB/RMLC contend that they should not be required to report tracks that they believe are non-payable because SoundExchange "has no statutory authority to collect and distribute royalties for sound recordings not subject to the statutory licenses." NAB/RMLC Comments at 49; Sirius XM Comments at 3 (arguing that SoundExchange's "statutory mandate is to collect royalties for performances made under the statutory license"). This too is beside the point. SoundExchange does not seek in these proposed regulations to collect or distribute royalties for non-payable tracks. The issue is that reporting of tracks asserted to be non-payable is essential to accurate collection of royalties for those sound recordings that are payable.

As noted above, Sirius XM has pointed out that, although reporting of directly licensed and pre-1972 tracks is necessary in some circumstances, SoundExchange's proposed regulations could be read to require services to report the transmission of "every voice break, interstitial, introduction, and the like." Sirius XM Comments at 3. Similarly, NAB/RMLC point out that that the current language of Section 370.4(d)(2) arguably requires that result. NAB/RMLC Comments, at 54-55. SoundExchange agrees that licensees should not report these sorts of incidental transmissions, and it is a problem when they do. To clarify that incidental transmissions should not be reported, SoundExchange proposes in Exhibit A revised language for Section 370.4(d)(2) that implements its proposal while also clarifying that incidental transmissions should not be reported.

MRI suggests that if the Judges adopt SoundExchange's proposal, SoundExchange should be required to return an electronic file identifying any disputed tracks. MRI Comments, at 5. If the Judges adopt SoundExchange's proposal, SoundExchange would certainly want and expect to implement business processes for communicating to licensees questions about deductions the licensees have taken. However, it is premature to know exactly what those processes would be, and hence to prescribe them by regulation. SoundExchange would not necessarily know about direct licenses that a licensee may be relying on. Accordingly, SoundExchange would need to use information reported by licensees pursuant to its proposal to investigate possible reporting issues. SoundExchange believes that the nature of its response to perceived under-reporting is a question that it should be left to address in the first instance as an operational matter. If there are subsequent issues, the Judges could consider the matter on a more informed basis at a later time.

E. Late or Never-Delivered ROUs

1. Proxy Distribution

SoundExchange proposes that the Judges grant it standing authorization to make proxy distributions when its board determines that it has done what is practicable to try to secure missing ROUs from a service and further efforts to seek missing ROUs are not warranted. Petition, at 27-29. In general, proxy distribution is not a desirable substitute for having actual usage data on which to base distributions to artists and copyright owners. However, in limited circumstances it has proven to be a satisfactory means of distributing small pools of royalties that cannot reasonably be distributed based on actual usage data.[48] SoundExchange's proxy proposal seems widely supported, although the Judges and various commenters raise questions concerning details of its implementation.

As an initial matter, because some commenters seem confused, it should be understood what is – and what is not – contemplated by SoundExchange's proposal. SoundExchange's proxy proposal addresses cases in which it has not received a useable ROU, and after taking reasonable actions to try to secure the missing ROU, SoundExchange determines that further efforts to seek the missing ROU are not warranted. As described in the Petition, experience shows that SoundExchange's efforts to coax recalcitrant licensees to provide ROUs over a period of years reduce the pool of royalties being held pending receipt of ROUs to a small sliver of the overall royalty pool. SoundExchange's proposal is not intended to address the ordinary case in which it receives an ROU that can be ingested into its royalty system but some lines of reported data do not match known repertoire. In such cases, SoundExchange pays the proper payees for

[48] SoundExchange's Petition stated that it had about $13.1 million in royalties for the 2010-2012 period that are undistributable due to missing or unusable ROUs (about 1.2% of total royalties for that period). Petition, at 28. That number has since fallen to about $9 million.

the matched usage, and attempts manually to identify, and if necessary, research the unmatched usage. If it is ultimately impossible for SoundExchange to identify some of the recordings used (and hence their artists and copyright owners) with reasonable confidence, SoundExchange handles the royalties associated with that usage in accordance with applicable regulations concerning the disposition of royalties payable to unidentified copyright owners and performers. *E.g.*, 37 C.F.R. § 380.8.[49]

NAB/RMLC and NPR support SoundExchange's proxy distribution proposal, although a little too enthusiastically. NAB/RMLC Comments, at 63-65; NPR Comments, at 9.[50] As SoundExchange cautioned in its Petition, there is a risk that licensees that face no compulsion to deliver ROUs, and that understand that their payments will eventually be distributed by proxy, will be even less motivated to deliver ROUs than they are today. Petition, at 29. The various broadcaster comments in this proceeding make clear that broadcasters would prefer not to do any reporting at all. The possibility of proxy distribution when licensees fail to report should not be allowed to become an excuse for non-reporting by licensees. Thus, if the Judges implement SoundExchange's proxy proposal, they should also implement a late fee to motivate reporting.

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[49] While the economic effects of that treatment are analogous to a proxy distribution, in that a reduction of SoundExchange's expenses for a year results in an increase in payments to everyone receiving royalties for that year, the processes are distinct. For clarity, when the A2IM comments refer to the desirability of using ISRCs to avoid use of a proxy process, it is referring to the unidentified payees process, and not to SoundExchange's proxy proposal. *See* A2IM Comments, at 3.

[50] For clarification, when the NPR Comments mention current proxy distribution of CPB payments, they are describing an analogous process of distributing royalties based on less than comprehensive data. That process is a function of the unique reporting arrangements in place for NPR, and is distinct from SoundExchange's proposal here. However, we agree with the thrust of NPR's comments that SoundExchange's proposal is conceptually similar to other situations in which royalties are distributed based on less than comprehensive data, and hence does not need to be subject to a higher level of oversight than other analogous situations.

Sirius XM and MRI recognize that use of a proxy may be necessary in some circumstances, but propose various procedural requirements. Sirius XM Comments, at 3-4; MRI Comments, at 6. Their suggestions are unnecessary and inappropriate.

First, they suggest notice to the service and an opportunity for the service to cure its reporting deficiencies. However, such notice and cure is assumed by SoundExchange's proposal, because the proposal becomes operative only after SoundExchange determines that it has done what is reasonable to seek the missing ROUs. In fact, SoundExchange's license management system will soon allow it to automate the sending of reminder notices to licensees that fail to provide required ROUs. As a result, licensees should expect even more persistent reminders from SoundExchange than when follow-up was a more manual process. Accordingly, providing licensees one last chance to produce an ROU that is years late would simply serve to delay distribution of royalties that should finally be placed into the hands of artists and copyright owners.

Next, Sirius XM and MRI express concerns about the distributive effects of different proxy distribution methodologies and propose a notice and comment process to address such methodologies. SoundExchange agrees that proxies are imperfect. That is why SoundExchange views proxy distribution as a last resort. But the procedures Sirius XM and MRI propose are unnecessary, and not desired by their supposed beneficiaries. Sirius XM and MRI have no stake whatsoever in the methodology used for a proxy distribution. The procedures they suggest could be justified as an expenditure of artists' and copyright owners' money only if those procedures would be welcomed and appreciated by artists and copyright owners. Notably, the artists and copyright owners who would be entitled to comment on the details of particular distribution methodologies under the Sirius XM/MRI proposals have not commented in this proceeding

concerning SoundExchange's suggestion that such details be left to SoundExchange's board. Instead, A2IM – the representative of the constituency for which Sirius XM and MRI express the most concern – is satisfied that it has a voice on the SoundExchange board. A2IM Comments, at 2. Artists and copyright owners understand that SoundExchange's board represents its constituents, and they are content to leave the technical details of how a proxy distribution would be implemented to SoundExchange. The Judges should not require SoundExchange to delay payments to artists and copyright owners – and spend their money – implementing a notice and comment process desired only by commenters with no interest in the matter.[51]

Finally, MRI confusingly argues that SoundExchange should not be able to agree with its members to discriminate against non-members. This concern makes no sense, but other regulations already prohibit SoundExchange from discriminating against non-members. *E.g.*, 37 C.F.R. § 380.4(g).

2. Late Fees

Because late submission of ROUs is a significant problem that delays distribution of millions of dollars of statutory royalties each year, and SoundExchange's proxy distribution proposal, while necessary, might provide licensees an excuse never to provide ROUs, SoundExchange proposed establishing a late fee for ROUs. Petition, at 29-30. The late fee provision it suggested including in Section 370.6(a) was patterned on the ones currently

[51] It also should be noted that, contrary to Sirius XM's and MRI's expressed concerns about SoundExchange favoring more popular repertoire at the expense of less repertoire, the Annual/License Type methodology used for the 2004-2009 distribution, which SoundExchange has said it would expect to be its default methodology, tends to be over-distributive. That is, the Annual/License Type methodology results in distribution of some royalties to everyone whose recordings were used by any other service of the same type, even though many of the less popular of those recordings were probably not used by the specific services whose royalties are being distributed by proxy.

contained in Sections 380.13(e) and 380.23(e) of the Judges regulations' by virtue of settlements with broadcaster groups. SoundExchange believes that this proposal is vitally important, because, as this proceeding has illustrated, some services have not made reporting a priority, and a late fee is the most practicable method of focusing their attention on the need to do better.

Sirius XM does not oppose SoundExchange's proposal, but suggests that (1) there should be no "stacking" of late fees when a service delivers a payment, SOA and ROU late, but on the same day; (2) no late fee should be payable for "inconsequential good-faith omissions or errors"; and (3) SoundExchange should be encouraged to work with services to identify and correct errors. Sirius XM Comments, at 4-5. SoundExchange does not disagree with Sirius XM's suggestions, although it is not clear to us that those suggestions require any changes in the proposed regulatory language:

- Sirius XM cites the Judges' *SDARS I* rate determination as holding that the current late fee provision for SOAs does not contemplate "stacking" of late fees when the payment and SOA are delivered late, but on the same day. Sirius XM Comments, at 4; *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080, 4100 (Jan. 24, 2008). SoundExchange did not intend to achieve a different result when it proposed the late fee for ROUs. The Judges did not see fit to address the subject of stacking specifically in the regulatory language providing late fees for SOAs. As to stacking, the regulatory language SoundExchange proposed to implement the late fee for ROUs does not seem meaningfully different from the language the Judges used to implement the late fee for SOAs. Accordingly it is not evident that stacking needs to be addressed in regulatory language here, although the treatment of stacking is a

matter that could be clarified in regulatory language if the Judges thought it necessary to do so in this context.

- Sirius XM cites the Judges' past determinations that no late fee should be payable for "inconsequential good-faith omissions or errors" in a SOA and suggests that the same principle should apply to ROUs. Sirius XM Comments, at 4; 73 Fed. Reg. at 4100; *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084, 24,108 (May 1, 2007). While SoundExchange patterned its ROU late fee proposal most directly on the Sections 380.13(e) and 380.23(e), rather than the somewhat different language of Sections 380.4(e) and 382.13(d) addressed by the Judges' prior determinations, SoundExchange did not expect or intend to collect late fees for inconsequential good-faith omissions or errors in ROUs. As this proceeding has illustrated, SoundExchange routinely receives a high volume of bad data in ROUs – particularly from broadcasters. However, under the ROU late fee provisions of Sections 380.13(e) and 380.23(e) that are applicable to broadcasters, SoundExchange has not sought to collect late fees for "inconsequential good-faith omissions or errors," and would not expect to do so if its proposal were adopted. While the Judges did not see fit to clarify in the regulatory language of Sections 380.4(e) and 382.13(d) that late fees are not payable where a licensee made only "inconsequential good-faith omissions or errors," the Judges could clarify that in proposed Section 370.6(a) if they deem it necessary and appropriate to do so.
- SoundExchange is strongly motivated to – and does – work with services to identify and correct errors where useful, without a regulatory provision requiring it to do so. As described elsewhere in these Reply Comments, bad data reported by licensees has

significant costs for SoundExchange and materially delays distribution of a significant amount of royalties. SoundExchange is well-motivated to reduce those costs and delays when it reasonably can, because the artists and copyright owners that control SoundExchange want their royalties quickly and with the minimum necessary expense deductions. However, this is not a subject that lends itself to regulation, for a couple reasons. First, not all licensees or reporting problems are situated similarly, so a one-size-fits-all approach does not make sense. A level of interaction between SoundExchange and a licensee that might be warranted for a high-paying licensee that has reporting issues that can be corrected by interaction and wishes to take steps to correct those issues may not be warranted for a licensee paying only a small amount of royalties or having different issues or less willingness to correct them. Second, facilitating future automatic processing of ROUs with errors does not necessarily require interaction between SoundExchange and the licensee. As described in Part III.C.1 of these Reply Comments, SoundExchange's systems have long been designed to learn from its previous manual efforts to match a licensee's reported usage to known repertoire. Regulations should not require efforts to address matters that SoundExchange has already addressed through the programming of its systems.

Broadcasters have quite a different perspective on SoundExchange's proposed late fee. NAB/RMLC accuse SoundExchange of seeking to "punish services who have trouble preparing their ROUs and submitting them on time," and oppose SoundExchange's proposal on the grounds that it is not necessary to compensate SoundExchange for the lost time value of money and that the Judges have previously declined to adopt this proposal. NAB/RMLC Comments, at

55-58. While almost no NEWs provide ROUs, NEWs say they are "uncomfortable" with the late fee provision because it might be invoked in the case of "one line of data with missing information or a typo." *E.g.*, KBCU Comments, at 3.[52] CBI echoes its members' comments. CBI Comments, at 11.

The broadcasters' vigorous opposition to SoundExchange's late fee proposal is remarkable, because that proposal was patterned on the late fee provisions of Sections 380.13(e) and 380.23(e) of the Judges regulations, which were negotiated and agreed to by NAB and CBI as part of settlements of the *Webcasting III* proceeding.[53] Despite their professed alarm over making these provisions permanent, the broadcasters do *not* say – nor could they – that SoundExchange has been "harsh" or "unreasonable" or sought to "punish" services in its administration of the current provisions. SoundExchange has been entirely reasonable and judicious in its administration of the current provisions, and would do likewise if the Judges adopt its proposal. To the extent there is any legitimate concern that SoundExchange might seek to apply the late fee provision unreasonably, those concerns are fully addressed by the discussion of immaterial errors above.

As described in Part I, slow and poor quality reporting of usage by licensees remains a problem even after a decade of experience with the notice and recordkeeping regulations, and SoundExchange's efforts to engage with licensees to obtain ROUs and improve their reporting.

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[52] WSOU proposes that late fees be capped at $100. WSOU Comments, at 4. While that might seem like a lot of money to WSOU, it would easily be ignored by a more usage-intensive service.

[53] NAB/RMLC suggest that SoundExchange coerced the broadcasting industry into accepting this provision. NAB/RMLC Comments, at 58 n.16. That suggestion is unfounded. The broadcasting industry is much bigger and more powerful than SoundExchange, and had the option of participating in a proceeding before the Judges if it was not satisfied with its settlement options.

In 2013, lateness in delivering ROUs affected approximately $203 million in royalties (about 31% of statutory royalties), and ROUs that SoundExchange received late were, on average, delivered about 90 days late. Under the quarterly distribution schedule SoundExchange used in 2013, such lateness delayed distribution to artists and copyright owners of about $19 million in royalties (and delayed the distribution of those royalties by at least a quarter). In 2014, SoundExchange has been providing monthly royalty distributions to artists and copyright owners that receive electronic payments and have royalties due of at least $250.[54] Under this schedule, similar lateness will cause delay in distribution of a much larger amount of royalties. Once a useable ROU is received, poor quality data initially delay the distribution of approximately 23% of the royalties associated with ingested ROUs paid to SoundExchange – or about $150 million in royalties for 2013.

While SoundExchange is eventually able to obtain and process data sufficient to distribute with reasonable accuracy all but a few percent of statutory royalty payments, distribution of tens of millions of dollars of royalties is held up for months or years in the process. SoundExchange believes that the possibility of late fees under the provisions that have been applicable to broadcasters for the last several years has been somewhat effective in encouraging broadcasters to provide ROUs on a timely basis. But despite their vigorous opposition to extending those provisions, they are not the only licensees that are late in reporting. The Judges should make the late fee for broadcasters a permanent feature of the reporting regime and extend it to other types of licensees.

[54] NAB/RMLC's statement that SoundExchange makes distributions only quarterly is outdated. *See* NAB/RMLC Comments, at 62.

3. Accelerated Delivery of ROUs

To help speed the flow of royalties to artists and copyright owners, SoundExchange proposed shortening the time for providing ROUs, making it 30 days following the end of the relevant reporting period. Petition, at 30-31. Almost all commenters opposed this proposal. *E.g.*, NAB/RMLC Comments, at 61-63; Sirius XM Comments, at 5; MRI Comments, at 6; NPR Comments, at 12.[55]

SoundExchange continues to believe that its proposal has merit. Under the monthly royalty distribution schedule SoundExchange implemented this year, the current 45-day reporting cycle for licensees means that even when licensees report quality data on time, distributions to artists and copyright owners are delayed by a month relative to what would be possible with a 30-day reporting cycle for licensees.

However, if the Judges decide not to adopt this proposal, SoundExchange would propose in the alternative linking the time for provision of ROUs to the time for providing payments and SOAs for the relevant type of service. Proposed regulatory language implementing this alternative proposal is attached as Exhibit B. This change would allow the Judges to consider in rate proceedings, based on the specific circumstances of the particular type of service involved, whether it would be practicable to shorten both the payment and reporting cycle, creating a future mechanism to accelerate the flow of royalties to artists and copyright owners in specific cases where the Judges consider that reasonable.

[55] CBI and various NEWs objected to this proposed change. *E.g.*, CBI Comments, at 11; KBCU Comments, at 4. Because almost no NEWs report usage at all, their views concerning how long they might need to report are entitled to no weight.

F. Correction of ROUs and SOAs

SoundExchange occasionally receives from licensees at their own initiative corrected ROUs and SOAs once it has already processed the licensee's ROUs and SOAs for the relevant period and distributed the relevant royalties. Fortunately, such occurrences are relatively uncommon. However, once SoundExchange has allocated the payment on a SOA to usage on an ROU, such corrections are very disruptive to the flow of royalties through SoundExchange. Moreover, while SoundExchange can always allocate an additional payment, downward adjustments may not be recoverable (or take a long time to recover) from some royalty recipients. To provide a clear process for correcting ROUs and SOAs, SoundExchange proposed a new Section 370.7 that would (1) bar licensees from claiming credit for a downward adjustment in royalty allocations after the date that is 90 days after submission of the original ROU or SOA; and (2) permit SoundExchange to allocate any adjustment to the usage reported on the service's next ROU, rather than the ROU for the period being adjusted. Petition, at 31-32.

We did not see that any commenter took exception to SoundExchange's proposal to allow it to allocate adjustments to future usage, which would be computationally and logistically simpler for SoundExchange than adjusting past royalty statements. The Judges should adopt that proposal in any event.

Sirius XM agreed that some deadline for adjustments is appropriate, although it suggested that six or nine months would be more appropriate than three. It also observed that "it should be clear that that this regulation does not impact the separate audit provision," and suggested that the deadline apply to claims by SoundExchange for upward adjustment. Sirius XM Comments, at 6. As to the first of Sirius XM's points, the later the deadline for claiming downward adjustments, the more potential there is for disruption to the orderly flow of royalties

and an inability for SoundExchange to recover royalties that have been distributed. While six months may not seem like all that long, it is long enough that SoundExchange will generally have distributed the vast majority of the relevant payment, and that current playlists will be very different. Receiving restated SOAs and ROUs claiming a downward adjustment within 90 days would be far less disruptive.

SoundExchange agrees with Sirius XM's observation that proposed Section 370.7 should not affect the audit process. Section 370.7 was intended to address the specific issue of licensees' self-reporting of corrections to ROUs and SOAs, and was not intended to address the entirely separate audit process. SoundExchange would have no objection to clarifying that point if the Judges were inclined to do so.

However, because Section 370.7 was not intended to affect the audit process, it is not apparent to SoundExchange that Sirius XM's other suggestion – a reciprocal deadline for claims by SoundExchange for upward adjustment – makes sense. While reciprocity in the adjustment deadline may have some superficial appeal, it must be remembered that the statutory licenses do not provide for reciprocity of information until there is an audit. Before that, all SoundExchange knows about a licensee's usage and royalty obligation is what the licensee has told SoundExchange. Thus, the audit process is the typical vehicle for SoundExchange to make claims for underpayment. Moreover, failing to pay statutory royalties when relying on the statutory licenses constitutes copyright infringement. *See* 17 U.S.C. § 114(f)(4)(B). The Judges could not negate that result by anything they might do in the notice and recordkeeping regulations.

NAB/RMLC oppose SoundExchange's proposed deadline for licensee self-correction of ROUs and SOAs. NAB/RMLC Comments, at 59-60. In part their opposition is based on

SoundExchange's audit right. *Id.* at 60. As described above, SoundExchange did not intend to preclude licensees from raising, as part of the resolution of an audit, errors tending to reduce their royalty obligations. Thus, as a practical matter, the audit clarification suggested by Sirius XM probably address most of NAB/RMLC's real concern.

NAB/RMLC are also just wrong that SoundExchange can – forever – recover past overpayments by withholding future royalty distributions. *Id.* While NAB/RMLC are correct that SoundExchange has reserved the right to recoup overpayments from artists and copyright owners, that does not mean that it is always possible to do so, or to do so quickly. The music business is hits driven, and tastes change quickly. Recordings also change ownership from time to time, and an overpayment to a former owner of a recording cannot be recovered from the current owner. Thus, the longer the time that elapses before an adjustment, the more complicated it is to recover an overpayment, and the less likely it is that SoundExchange will be able to fully recover money that has already been distributed.

It adds insult to injury to suggest that SoundExchange should pay licensees interest on overpayments when SoundExchange has distributed the money to artists and copyright owners, may not be able to recover the overpayments from them, and will have to expend significant effort to process an adjustment. SoundExchange is not a bank. Licensees should pay their royalties accurately, and not view depositing money with SoundExchange as a possible investment option.

NAB/RMLC can't seriously suggest that ROUs and SOAs should perpetually be subject to adjustment. There should be some reasonable deadline for SoundExchange's processing of claimed overpayments. SoundExchange believes that a three month deadline would be appropriate.

G. Recordkeeping

Section 114(f)(4)(A) requires that the Judge adopt regulations pursuant to which records of use of sound recordings "shall be kept and made available by entities performing sound recordings." This recordkeeping obligation is distinct from the "requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." ROUs serve the purpose of providing notice of use.[56] Currently, what is required in the way of recordkeeping for usage is simply that licensees retain copies of their ROUs for three years. 37 C.F.R. §§ 370.3(h), 370.4(d)(6). Because this arrangement does not provide artists and copyright owners any assurance that they will be able to look behind a licensee's ROUs to assess their accuracy in an audit, SoundExchange proposed in Section 370.4(d)(5) that services be required to retain and provide access to unsummarized source records of usage in electronic form, such as server logs or other native data, rather than simply the ROUs that are supposed to be derived therefrom. Petition, at 32-34.

SoundExchange believes that both Section 114(f)(4)(A) and sound policy require the Judges to adopt a more robust recordkeeping requirement. When SoundExchange's auditors have been able to access underlying source records, SoundExchange frequently has found underpayment and underreporting. These practices can have significant economic consequences. In one case, non-reporting of transmissions of 30 seconds or less has been estimated to have led to a 10-20% underpayment. In another case, SoundExchange's auditor found a 16%

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[56] 63 Fed. Reg. at 34,295 ("[b]ecause section 114(f)(2) mandates requirements by which 'copyright owners' may receive reasonable notice of the use of their recordings, provision must be made for individual copyright owners to have access to the Reports of Use"), 34,296 (in Section 201.36(a) describing report of use regulations as "prescrib[ing] rules under which Services shall serve copyright owners with notice of use of their sound recordings"); NAB/RMLC Comments, at 13.

underpayment based on non-reporting of transmissions of 60 seconds or less and of recordings that listeners joined in progress. In such an environment, requiring licensees to retain only their self-serving ROUs, and not the documentation from which those ROUs were derived, does not assure copyright owners of access to genuine "records of . . . use" as contemplated by Section 114(f)(4)(A). This is why voluntary licenses commonly require licensees to retain supporting records, not just copies of the reporting that they provide to their licensors. In the same manner, the Judges should not design a reporting system that provides no meaningful check on licensees that might not be sufficiently motivated to ensure the accuracy of their payments.

Because nobody likes to be the subject of a meaningful audit, commercial licensees and their service provider opposed SoundExchange's proposal. NAB/RMLC Comments, at 65-67; Sirius XM Comments, at 6; Triton Comments, at 6-9.

NAB/RMLC principally argue that this proposal should be rejected because the Judges rejected a proposal for server log retention that was "just litigated" in the *Webcasting III* rate proceeding. NAB/RMLC Comments, at 65. First, SoundExchange's proposal here is different from the one it made in *Webcasting III*. In *Webcasting III*, SoundExchange's proposal was for the retention of "original server logs sufficient to substantiate all rate calculation and reporting." Second Revised Proposed Rates and Terms of SoundExchange, Inc. in Docket No. 2009-1 CRB Webcasting III, at 15 (July 23, 2010). Here, SoundExchange's proposed regulatory language provides "server logs" as an example of permissible record retention, but is intentionally more flexible, allowing licensees to retain "unsummarized source records of usage underlying the Report of Use" that might be appropriate to the circumstances. The point is that licensees use some kind of underlying records to generate their ROUs. Whatever those records are, licensees

should be required to retain evidence of the decisions the licensees made in determining what usage to report to SoundExchange.

Second, the decisional standards applicable to rate cases are different from the requirements of this rulemaking proceeding. In *Webcasting III*, the question was whether SoundExchange's proposed server log retention term "would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). Based on the record of that proceeding, the Judges found that SoundExchange "failed to meet its evidentiary burden." *Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 79 Fed. Reg. 23,102, 23,125 (Apr. 25, 2014). Here, the question is whether SoundExchange's current proposal is appropriate or even necessary to assure copyright owners of access to records of use as contemplated by Section 114(f)(4)(A). The Judges' *Webcasting III* decision does not speak to that question.

Finally, it is misleading to refer to Webcasting III as "just litigated." While the Judges' most recent Webcasting III decision was published in the *Federal Register* only a few months ago, direct cases in that proceeding were filed in 2009, and the evidentiary record was closed in 2010. Five years after SoundExchange first made its *Webcasting III* server log retention proposal, the Judges should indeed consider SoundExchange's current proposal based on current facts.

Turning to the merits, NAB/RMLC argue that retaining source records of usage would be unduly burdensome. Referring to the need to "[r]etain[] logs of every user connection for three years across multiple stations," the suggestion is that such records would be of such vast size that licensees could not possibly be expected to retain that much data. They challenge

SoundExchange to quantify the burden that it would place on them, while making no effort to do so themselves. NAB/RMLC Comments, at 65.

Of course, broadcasters are uniquely positioned to know how large their unsummarized source records of usage are, and what it might cost them to store those records within their current information technology environments. That they made no effort to quantify these circumstances is a sign that the burden of such storage is really not all that substantial in today's world of "big data" and cloud storage. While the size of such records would obviously depend on the nature of the records and the specific data elements the licensee chooses to include in them, the extent of usage of a particular licensee's service, and the licensee's technological approach to storing the records, the information available to SoundExchange suggests that such records are not at all large by current standards. "Organizations are inundated with data – terabytes and petabytes of it."[57] By contrast, an average webcaster's usage data is relatively compact.

The ROUs SoundExchange receives vary in size between 1 kilobyte and 270 megabytes. Based on the sizes of detailed monthly log files it has examined for SoundExchange and other clients, SoundExchange's audit firm has estimated that detailed webcaster server log files for statutory licensees would likely vary in size within the large range of half a gigabyte to possibly over 65 gigabytes per month, with the latter representing the logs of an extremely usage-intensive commercial webcaster whose logs contain significant sound recording metadata. Thus, the high end of that range represents approximately the largest source records that one

[57] SAS, Big Data Meets Big Data Analytics, http://www.sas.com/content/dam/SAS/en_us/doc/whitepaper1/big-data-meets-big-data-analytics-105777.pdf, at 1; *see also* What is Big Data, http://www.ibm.com/big-data/us/en/ ("Big data is being generated by everything around us at all times. Every digital process and social media exchange produces it. Systems, sensors and mobile devices transmit it.").

realistically might expect to exist. For all licensees, the actual log file size depends on the log file structure and the licensee's archiving practices. For example, log files are much smaller when the licensee links to sound recording metadata stored externally to the log rather than repeating that metadata within the log. While these factors make it difficult to generalize about the size of log files or other source records, SoundExchange understands that even large broadcaster licensees may well have log files that are smaller than five gigabytes per month.

At five gigabytes per month, three years of source records would constitute 180 gigabytes of data, which would fit comfortably on the hard drive of any relatively recent computer. To the extent that a licensee might wish to make special storage arrangements, a three terabyte hard drive is available for $110 or less,[58] and three years of such records would use up only 6% of the space on the drive. Google also offers long-term cloud storage for 2¢ per gigabyte per month.[59] Thus, three years of such records could be stored in the cloud for $3.60 per month. Even at the high end of SoundExchange's audit firm's estimate (which likely would apply only to an extremely usage-intensive commercial webcaster paying many millions of dollars in statutory royalties), and without any efforts to store the data more efficiently, 36 months of records at 65 gigabytes per month would equal less than 2.5 terabytes of data, which would still leave room on that $110 three terabyte hard drive, or cost less than $50 per month to store in the cloud. In the current environment, file size and storage cost just are not reasons that licensees should be allowed to discard their detailed usage data before the end of the audit period.

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[58] *E.g.*, http://www.amazon.com/Seagate-Expansion-Desktop-External-STBV3000100/dp/B00834SJU8/ (as of Sept. 3, 2014 quoting a price of $109.99 for a Seagate 3TB external hard drive).

[59] https://developers.google.com/storage/pricing#storage-pricing.

NAB/RMLC argue that source records, and particularly server logs, might be confusing. NAB/RMLC Comments, at 66. Triton similarly argues that raw data can be misinterpreted, and specifically argues that some short connections may not constitute payable performances. Triton Comments, at 7. However, these suggestions illustrate precisely why SoundExchange should have access to source records underlying ROUs. Preparing ROUs is not a purely mechanical task. Licensees and their contractors like Triton make decisions about what uses they will report and pay for, and which they will *not* report and pay for. In essence, NAB/RMLC and Triton argue that licensees' decisions should conclusively be considered proper, and SoundExchange should have no practical ability to look behind and question those decisions. This is just to say that they would prefer not to be audited. It is not a reason for the Judges to deny SoundExchange access to genuine records of use as contemplated by Section 114(f)(4)(A).

Finally, NAB/RMLC argue that third parties may control server logs, and that the terms in Section 380.15(d) already address access to such records. NAB/RMLC Comments, at 66-67. SoundExchange's proposal specifically addresses access to third-party records, in a way that is compatible with, but not superseded by, Section 380.15(d). Specifically, SoundExchange proposes that "[i]f the Service uses a third-party contractor to make transmissions and it is not practicable for the Service to obtain and retain unsummarized source records of usage underlying the Report of Use, the Service shall keep and retain the original data concerning usage that is provided by the contractor to the Service." Petition, at 56. It appears that broadcasters "are willing to make available to SoundExchange in connection with an audit these relevant records." NAB/RMLC Comments, at 67. Beasley indicates that it already keeps these records for three years. NAB/RMLC Comments, at Exhibit D ¶ 15. For this reason, Triton's expressed concerns about data duplication and storage are simply irrelevant. *See* Triton Comments, at 6.

Sirius XM takes a different approach, arguing that SoundExchange's proposal would transform its audits into "technical audits," and asserting that the Judges rejected the concept of technical audits in the *Webcasting II* rate proceeding. Sirius XM Comments, at 6. However, the portion of the Judges' decision they cite concerned auditor qualifications. 72 Fed. Reg. at 24,109. This decision has no bearing on SoundExchange's current proposal. Notably, Sirius XM has nothing to say about data volumes or data storage costs.

When a service's royalty payments depend on its usage of sound recordings, it obviously would prefer not to have SoundExchange second-guess its decisions about how it has computed its payments. However, that is precisely why the Judges have consistently authorized SoundExchange to verify licensees' royalty payments on behalf of artists and copyright owners. *E.g.*, 37 C.F.R. § 380.6. The Judges' should not make auditing an illusory process, and should instead adopt SoundExchange's source record retention proposal.

H. Proposals SoundExchange Characterizes as Housekeeping

1. Quattro Pro Template

SoundExchange proposed deleting the requirement in 37 C.F.R. § 370.4(e)(2) that it provide a template ROU in Quattro Pro format. Petition, at 34. The idea to have a Quattro Pro template was originally the Copyright Office's. *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 70 Fed. Reg. 21,704, 21,706 (Apr. 27, 2005). It is not evident to SoundExchange that any licensee was ever interested in the availability of such a template or ever used Quattro Pro to prepare its ROUs. Whether or not such interest might once have existed, the comments in this proceeding do not indicate any demand for a Quattro Pro template today. Moreover, there is no need for a Quattro Pro template today. Quattro Pro does not appear to be available as a standalone product today. Its successor product WordPerfect

Office is capable of reading files in Microsoft Excel format.[60] As a result, if any licensee wished to compile an ROU using WordPerfect Office, it could load SoundExchange's Excel template into WordPerfect Office and do so.

Unaware of any interest in Quattro Pro or WordPerfect Office, NAB/RMLC and various NEWs suggest that SoundExchange should be required to provide templates in Google Sheets or other formats. *E.g.*, NAB/RMLC Comments, at 71; KBCU Comments, at 2. As an initial matter, these suggestions should be discounted because nothing in the record suggests that calls for other templates have any basis in actual reporting operations, as opposed to mere speculation about how ROUs might be prepared. Licensees today could use any spreadsheet software they want to prepare ROUs,[61] yet SoundExchange has seen no indication that licensees are actually preparing ROUs using any spreadsheet software other than Excel. In contrast to other portions of the NAB/RMLC Comments that cite the circumstances of particular broadcasters, the NAB/RMLC Comments contain no indication whatsoever that there is any actual operational demand for a template in any format other than Excel. The NEWs' boilerplate requests for a Google Sheets template also do not clearly reflect any real operational need, since most of the requests come from licensees that do not (and as discussed in Part II, we assume will not) report at all. SoundExchange should not be required to spend the money of artists and copyright owners indulging fanciful ideas that have no basis in real reporting operations.

These requests also reflect a misunderstanding of the role of the template in the generation of reports of use. Consistent with the Copyright Office's original description, 70 Fed.

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[60] WordPerfect Office X7 Quick Reference Card: Working with Microsoft Office Files, *available at* http://www.corel.com/static/landing_pages/16900020/WPO_2.pdf.

[61] Section 370.4(e)(2) is a requirement for SoundExchange to provide a template, not a requirement for licenses to use particular spreadsheet software – or spreadsheet software at all – to prepare their reports of use.

Reg. at 21,706, the template is a spreadsheet data file that provides a structure for licensees to input the usage data required by the regulations. Today's spreadsheet software commonly reads data files in formats other than their own proprietary format, and it is particularly common for other brands of spreadsheet software to read Excel files. Thus, for example, and just like WordPerfect Office, Google Sheets reads files in Excel format.[62] In fact, a user need only drag and drop SoundExchange's Excel template into Google's spreadsheet interface to work with that template using Google Sheets. There just is no reason for SoundExchange to make available templates in formats other than Excel.[63]

2. Inspection of ROUs

Section 370.5(d) requires SoundExchange to make ROUs available for inspection by copyright owners at SoundExchange's office, and requires SoundExchange to try to locate copyright owners to enable such inspection. In SoundExchange's petition, it proposed that the Judges amend this provision to (1) conform it to current law by recognizing that SoundExchange should permit inspection of ROUs by featured artists as well,[64] and (2) conform it to longstanding practice by recognizing that copyright owner inspection of ROUs has never been an operationally-significant aspect of the statutory licenses. *See* Petition at 34-36; NPRM at 25,044.

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[62] Overview of Google Sheets, https://support.google.com/docs/answer/140784?hl=en&ref_topic=20322 ("Here's what you can do with Google Sheets: Import and convert Excel, .csv, .txt and .ods formatted data to a Google spreadsheet").

[63] CBI and various NEWs express the view that SoundExchange should update its template based on the outcome of this proceeding. *E.g.*, CBI Comments, at 8; KBHU Comments, at 2. SoundExchange will of course do that.

[64] Since this provision was originally crafted by the Office, the Small Webcaster Settlement Act, Pub. L. No. 107-321, 116 Stat. 2780 § 5(c) (2002), amended Section 114(g)(2) to provide for direct payment to artists by SoundExchange.

a. Inspection by Artists

As to the first of SoundExchange's proposed amendments, NAB/RMLC contend that "it is not for the Judges to provide" artists with access to ROUs because ROUs are "highly confidential," and Section 114(f)(4)(A) empowers the Judges to provide notice of use only to "copyright owners." NAB/RMLC Comments, at 82.

This argument, however, is based on a misunderstanding of Section 114(f)(4)(A). That provision requires the Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." Congress has explained that a purpose of such notice requirements is "to insure payment to the proper parties." H.R. Rep. No. 108-408, at 42 (2004). Toward that end, the Judges have prescribed the regulations that are the subject of this proceeding, which among other things require licensees to provide ROUs to SoundExchange. Those ROUs fulfill the notice function contemplated by Section 114(f)(4)(A) and allow SoundExchange to pay the copyright owners *and artists* that Section 114(g)(2) and the Judges' regulations require SoundExchange to pay.

It is an entirely separate question whether SoundExchange must treat ROUs or the information contained therein as confidential, or on the other hand whether SoundExchange should be permitted or required to provide access to the ROUs it has received by persons who have a business interest under the statute in knowing their contents. NAB/RMLC's argument is based on an implicit, faulty premise that Section 114 somehow makes ROUs confidential except as to copyright owners. However, nothing in the language of Section 114(f)(4)(A) mandates that any of the information disclosed as part of the notice mechanism adopted by the Judges must be kept confidential. Nor does it even suggest that, in implementing a mechanism for providing reasonable notice to copyright owners, featured artists may not have access to the information

that is disclosed to SoundExchange in ROUs. Thus, at the very least, Section 114(f)(4)(A) leaves it to the Judges' discretion to determine who should be able to access the ROUs that the Judges require licensees to provide to carry out the statutory notice function.

The recent determination of the Register of Copyrights in the context of *Phonorecords II* makes clear that Section 114(f)(4)(A) should not be read to incorporate an implicit assumption of confidentiality. There, in response to a referral from the Judges, the Register concluded that the almost identically-worded notice provision of Section 115 did not authorize the Judges to require that copyright owners keep confidential information reported by licensees pursuant to that provision. *See Scope of the Copyright Royalty Judges Authority to Adopt Confidentiality Requirements upon Copyright Owners within a Voluntarily Negotiated License Agreement*, 78 Fed. Reg. 47,421, 47,423 (Aug. 5, 2013) (rejecting the argument that "the CRJs' notice and recordkeeping authority authorizes the imposition of obligations on the copyright owners who are subject to the section 115 license"); *see also Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords*, 78 Fed. Reg. 67,938, 67,941 (Nov. 13, 2013) ("*Phonorecords II*") (declining to adopt proposed confidentiality provisions based on the Register's determination). If the notice language of Section 115 does not authorize the Judges to adopt a confidentiality provision for the accountings provided thereunder, essentially the same language in Section 114 cannot implicitly require confidentiality for the recipients of ROUs thereunder.[65]

[65] Despite the Register's decision in *Phonorecords II*, SoundExchange has not sought in this proceeding to challenge the Judges' prior confidentiality provision in Section 370.5(e). SoundExchange has sought only a much more limited amendment that would expressly require it to permit inspection of ROUs by artists.

Finally, ROUs are not nearly as sensitive as NAB/RMLC suggest. Most of the information contained in ROUs is just *not* confidential. The names of services, artists, sound recordings, albums, and labels could hardly be more public. Even the playlists of services can't be said to be confidential in any traditional sense of that word. When a broadcaster or other licensee transmits a *public* performance of a recording, it by definition makes its use of that recording nonconfidential. *See, e.g.,* 17 U.S.C. § 114(d)(2)(C)(ix) (requiring licensees to display to a public audience of listeners much of the identifying information contained in ROUs). SoundExchange recognizes that licensees would prefer not to have their competitors obtain easy access to comprehensive and detailed information about their playlists and the frequency of their use of particular recordings. However, SoundExchange has not proposed opening its doors to *licensees* to inspect each others' ROUs. It has only proposed permitting *featured artists* to access ROUs at SoundExchange's office *pursuant to agreements restricting the artists' use of the ROUs.*

Ever since the amendment of Section 114(g)(2) to provide for direct payment of featured artists by SoundExchange, artists have had a very direct interest in the contents of ROUs that rooted in Section 114 itself. The Judges should not allow NAB/RMLC's false assumption of an implied confidentiality restriction to override artists' direct statutory interest in the contents of ROUs.

MRI, by contrast, agrees with SoundExchange that artists should be able to inspect ROUs, but takes an opposite tack from NAB/RMLC by suggesting that SoundExchange be required to send copies or provide online access to ROUs to artists and copyright owners. MRI Comments, at 7. As an initial matter, artists and copyright owners have not asked to see unprocessed ROUs in the ordinary course. This is a transparent effort by MRI to require

SoundExchange to spend the money of artists and copyright owners to build and operate an infrastructure to deliver ROUs to create some kind of a business opportunity for MRI. Moreover, while SoundExchange is not overly impressed with NAB/RMLC's claims that ROUs are "highly confidential," SoundExchange is sympathetic to the view that comprehensive and detailed information about playlists and play frequency does not need to be in general circulation. Within the music industry, it is not customary for artists and record companies to have access to detailed information about usage of the works of other artists and record companies, so MRI's suggestion that complete, unprocessed ROUs be sent in the ordinary course to potentially everyone in the music industry would be a radical departure from current practice that might raise competitive concerns for artists and copyright owners as well as services.

b. Locating Copyright Owners to Enable Inspection of ROUs

NAB/RMLC alone take exception to SoundExchange's proposed deletion of the requirement that it try to locate copyright owners to encourage them to come by its reading room to inspect ROUs. NAB/RMLC Comments, at 91-93. NAB/RMLC's lack of any interest in this matter, while no artist or copyright owner has expressed any concern whatsoever about this housekeeping change, would be a sufficient reason for the Judges to ignore NAB/RMLC's purported concerns. NAB/RMLC's professed interest in payment of artists and copyright owners is also ironic given their efforts with respect to almost every other issue presented in this proceeding to weaken requirements for reporting of the data that SoundExchange needs to be able to identify and pay artists and copyright owners.

If the Judges are interested in considering NAB/RMLC's position on its merits despite NAB/RMLC's not having any reason to care about SoundExchange's relationship with artists and copyright owners, the Judges should understand that NAB/RMLC's argument bears little

relationship to the provision at issue or even the subject matter of this proceeding. NAB/RMLC acknowledge that the premise of the current provision – making available unprocessed ROUs in the ordinary course – "does not make sense." NAB/RMLC Comments, at 92. Yet NAB/RMLC oppose deletion of a provision that "does not make sense" because of an expressed concern about SoundExchange's efforts to locate *for payment purposes* both copyright owners *and artists* – when the current provision does not speak to payment or mention artists, and NAB/RMLC has opposed SoundExchange's efforts to add a reference to artists to the first part of the relevant paragraph (as discussed above). In the end, NAB/RMLC advocate a completely different provision than the one SoundExchange proposed deleting, and one that goes well beyond "requirements by which copyright owners may receive reasonable notice of the use of their sound recordings." 17 U.S.C. § 114(f)(4)(A).

As SoundExchange explained in its initial comments, it has made significant and ongoing efforts throughout its history to locate for payment purposes both copyright owners and artists. SoundExchange Comments, at 15. Those efforts will continue unabated without NAB/RMLC's proposed new provision just as they have in the absence of that provision in the past. SoundExchange's proposal to delete a provision that "does not make sense" was always a "housekeeping" proposal. The Judges should treat it as such.

3. Redundant Confidentiality Provisions

SoundExchange proposed deleting the redundant confidentiality provisions in Sections 370.3(g) and 370.4(d)(5). Petition, at 36-37. We did not see that any other commenter addressed that proposal. The Judges should make that housekeeping change.

4. Clarification of New Subscription Services and Definition of Aggregate Tuning Hours

SoundExchange proposed clarifying in current Section 370.4(d)(2)(vii) (Section 370.4(d)(2)(viii) as numbered in the proposed regulations included in the Petition and NPRM) that the reference therein to new subscription services was intended to allow cable music services paying royalties under 37 C.F.R. Part 383 on a percentage of revenue basis, but not new subscription services providing subscription webcasting and paying royalties pursuant to 37 C.F.R. Part 380 Subpart A on a per-performance basis, to report usage on an aggregate tuning hour ("ATH") rather than actual total performance ("ATP") basis, because the former face "technological impediments to measuring actual listenership." 73 Fed. Reg. at 79,729. SoundExchange proposed related conforming changes in the definition of aggregate tuning hours in Section 370.4(b)(1). Petition, at 37-38.

SoundExchange did not see that any commenter questioned SoundExchange's interpretation of what was originally intended in Section 370.4(d)(2)(vii). Sirius XM proposed an unrelated change to that provision (*see* Part IV.G). NAB/RMLC opposed SoundExchange's proposal, but not specifically because of its proposed change in the treatment of new subscription services. Instead, NAB/RMLC's opposition was based on misplaced concerns about ATH reporting enabled by Part 380, and because they advocate leaving to rate proceedings the question whether particular categories of services should be permitted to report on an ATH basis rather than an ATP basis (anticipating that they will argue in *Webcasting IV* that broadcasters should be able to do so). NAB/RMLC Comments, at 76-80.

NAB/RMLC's opposition to this proposal is much ado about nothing. The Copyright Act could hardly be clearer that the Judges are empowered to adopt notice and recordkeeping provisions in rate proceedings: "Among other terms adopted in a determination, the Copyright

Royalty Judges may specify notice and recordkeeping requirements of users of the copyrights at issue that apply in lieu of those that would otherwise apply under regulations." 17 U.S.C. § 803(c)(3). SoundExchange recognizes that, pursuant to that provision, there are certain categories of services that are permitted by provisions in Part 380 to report on an ATH basis. Because Section 803(c)(3) specifies that notice and recordkeeping requirements adopted in rate proceedings "apply in lieu" of the regulations in Part 370, SoundExchange assumed that the relevant provisions of Part 380 would continue to supersede the limitations in Part 370 as they have done in the past, so services permitted by provisions in Part 380 to report on an ATH basis would continue to be able to do so notwithstanding anything in Part 370. Thus, by operation of Section 803(c)(3), SoundExchange's proposal is entirely consistent with the result for which NAB/RMLC advocates, and Section 803(c)(3) makes NAB/RMLC's proposals entirely unnecessary.

In the course of advocating for what Section 803(c)(3) plainly allows, NAB/RMLC suggest defining the term ATH in Section 370.4(b)(1) without reference to specific types of services. SoundExchange followed the Judges' lead in identifying various categories of service in the definition of ATH, and SoundExchange does not think that removing the references to service types is necessary to achieve the result that NAB/RMLC want. However, SoundExchange agrees with NAB/RMLC that the concept of ATH is not inherently limited to certain kinds of services, so it is not necessary to state redundantly in the definition of ATH what services are eligible to report on an ATH basis. Because it would be consistent with good regulatory draftsmanship to simplify the ATH definition, SoundExchange has included a proposed simplified definition of ATH in Exhibit C.

Moreover, while SoundExchange questions whether the ATP and/or ATH reporting provisions should, uniquely among the provisions in Part 370, direct casual readers to the applicable terms for superseding provisions, SoundExchange is not opposed to including somewhere in Part 370 an indication that reporting on a different basis might be permissible under applicable terms. However, SoundExchange believes that the specific regulatory language NAB/RMLC propose at page 79 of their comments is not as clear as it should be about where the reader should look to find different reporting provisions, and improperly assumes that such other provisions necessarily would track the ATH reporting provisions here. In case the Judges are inclined to adopt language along the lines proposed by NAB/RMLC, SoundExchange has included clearer alternative language in Exhibit C.

SoundExchange disagrees with NAB/RMLC's suggestion that broadcasters should be permitted to report usage on an ATH basis rather than an ATP basis when the royalties broadcasters pay are calculated on a per-performance basis. See NAB/RMLC Comments, at 77-78. However, because NAB/RMLC do not suggest any change in the notice and recordkeeping regulations that would presently allow such reporting in any new situation, no detailed response is required at this time.

5. Miscellaneous

a. SoundExchange Annual Report

SoundExchange proposed specifying in regulations that its annual report required by Section 370.5(c) should be posted by September 30. As explained in the Petition and in SoundExchange's initial comments, SoundExchange proposed the September 30 date to allow it sufficient time to receive (and hence quantify) its royalty collections for a calendar year, close its books on the year, and complete its annual audit, rather than rushing to release an annual report

based on incomplete and unaudited numbers by March 31, as has been the case based on a preference previously expressed by the Judges. Petition, at 38-39; SoundExchange Comments, at 17. Only NAB/RMLC seem to have addressed this proposal.

NAB/RMLC argue that SoundExchange should be required to provide an annual report within 90 days after the close of the year, and also propose amendments that would require SoundExchange to provide "more comprehensive and detailed information" in its annual reports and provides a laundry list of information it would like to see in those reports. NAB/RMLC Comments, at 84-89.

As an initial matter, the Judges' authority relative to the issue of an annual report by SoundExchange is very limited, and to the extent such authority exists, NAB/RMLC are not parties in interest. Section 114(f)(4)(A) empowers the Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings." 17 U.S.C. § 114(f)(4)(A). SoundExchange plays a part in providing copyright owners notice of the use, and an annual report of some kind can perhaps be justified if integral to that function. However, Section 114(f)(4)(A) is not an invitation to the Judges to impose on SoundExchange the kinds of extensive recordkeeping and reporting provisions contemplated by NAB/RMLC. Under Section 114(f)(4)(A), recordkeeping and reporting is for "entities performing sound recordings."[66]

The Copyright Office recognized the limits of notice and recordkeeping authority when it originally adopted the annual report provision. That provision was adopted as part of the original

[66] *See* 78 Fed. Reg. 47,421, 47,423 (Aug. 5, 2013) (nearly identical language in Section 115 authorizes Judges "to issue notice and recordkeeping requirements under which records of such use shall be kept and made available *by licensees*" (emphasis original)).

Section 114 notice and recordkeeping regulations. 63 Fed. Reg. at 34,297. When the Office adopted it, the Office explained this provision as part of its discussion of how copyright owners would receive notice of use from the collective that copyright owners had only just agreed to establish, and that would eventually become SoundExchange. *Id.* at 34,294. The idea was, evidently, to provide copyright owners certain basic information concerning the operation of the yet-to-be-formed collective so that they could understand how it would provide them payments and usage information. That limited function probably represents a valid exercise of notice and recordkeeping authority, but makes clear that the only legally-relevant beneficiaries of the annual report are those who are entitled to notice of use, not licensees.

Turning to the specifics of NAB/RMLC's arguments and proposals, SoundExchange has seen no indication that artists and copyright owners are clamoring for an early look at incomplete and unaudited financial statistics. NAB/RMLC's analogy to the timing of reporting by publicly-traded companies is simply inapt. Companies that sell products and services recognize revenue pursuant to complicated accounting rules, but the upshot of those rules is that on January 1, companies can determine from information in their possession, such as signed contracts, shipment records, timecards and invoices, what revenue they can recognize for the year ended December 31. SoundExchange is not so lucky. It can only estimate its royalty collections for a year until licensees actually pay and provide statements of account allowing SoundExchange to associate a payment with the relevant year. As a result, it is only late in the first quarter of each year that SoundExchange can reasonably determine its royalty collections for the previous year, and SoundExchange's annual audit typically is not complete until June of the following year. Thus, providing an annual report with audited numbers is not feasible until the third quarter. Given the limited role of the annual report, the lack of demand for it, and SoundExchange's

desire to provide the report required by regulations in the form of a more typical corporate annual report, SoundExchange proposes making the deadline the end of the third quarter.

Finally, as to NAB/RMLC's proposal that SoundExchange report a laundry list of information, the discussion above makes clear that all or most of this information is well outside the scope of the Judges' notice and recordkeeping authority, because it does not have anything to do with providing notice of use to copyright owners. To be sure, SoundExchange has provided and will continue to provide appropriate information about its operations to its artist and copyright owner constituents. Moreover, as a tax exempt organization, SoundExchange is separately required to file an annual information return on IRS Form 990 that identifies various financial information similar to that suggested by NAB/RMLC. Even if the Judges had authority to require SoundExchange to report the kinds of information sought by NAB/RMLC as a notice and recordkeeping regulation, the Judges should not require SoundExchange to spend the money of artists and copyright owners preparing additional elaborate disclosure documents that NAB/RMLC seek simply to get a leg up in discovery for rate proceedings.

b. SoundExchange Address, Etc.

The "Miscellaneous" section of the NPRM grouped together a handful of other proposals, including removing an incorrect address for SoundExchange, using consistent references to defined terms and the statutory licenses, and eliminating the definition of a term that is not used. Petition, at 38-40. We did not see that any commenter other than NAB/RMLC addressed these proposals. NAB/RMLC did not oppose these changes, but they suggested that SoundExchange be required to publish its address on the homepage (in contrast to some other page) of its website. NAB/RMLC Comments, at 71-72. It happens that SoundExchange's address *is* on the homepage of its website at http://www.soundexchange.com/. However, it does not seem

necessary for the Judges in their notice and recordkeeping regulations to micromanage the location of contact information on SoundExchange's website.

IV. Additional Issues

In their comments, NAB/RMLC and Sirius XM propose a number of additional changes to the notice and recordkeeping regulations that were not contemplated by the NPRM. The Judges should decline to address these proposals in this proceeding for the reasons the Judges, in their 2009 notice and recordkeeping proceeding, declined to consider "additional proposals [that] went beyond the scope of the Judges' specific inquiry." *See Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 74 Fed. Reg. 52,418, 52,422 (Oct. 13. 2009). There, the Judges explained that proposals raised for the first time in comments were not "ripe for determination," were "insufficiently developed," and "merit more detailed consideration" than would have been afforded if they were considered in that posture. *Id.* at 52,422. The Judges thus considered new proposals only insofar as they amounted to clarifications or a technical change (such as a change in address or typographical correction). *Id.* at 52,423. In fact, the adoption of proposals that go beyond the scope of the Judges' NPRM could amount to a serious procedural violation. *See, e.g., Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977).

To the extent that the Judges may be interested in addressing some of the new proposals made in the initial comments, SoundExchange addresses them briefly below.

A. Systematic Adjustment Process

Sirius XM and its contractor MRI vaguely suggest that SoundExchange be required to implement some kind of an automated, systematic adjustment process with licensees. Sirius XM Comments, at 1, 5; MRI Comments, at 2-3.

While SoundExchange is not opposed to exploring such a process with individual licensees where that makes sense, such a process does not lend itself to treatment in regulations. This proceeding illustrates that the approximately 2,500 statutory licensees vary widely in their size, usage, technical sophistication and information technology infrastructures. While Sirius XM professes to want sophisticated technical interaction with SoundExchange, most commenters in this proceeding claim to have difficulty using spreadsheet software to generate even the most basic ROUs. *E.g.*, KNHC Comments, at 2 (licensee "is capable of providing" ROUs in Google spreadsheet and Excel formats, but "would be hard pressed to use any others"). Even NAB/RMLC lament the variety and primitive state of their members' systems. NAB/RMLC Comments, at 10-11. This is why it has been controversial to specify requirements for ROUs, even though delivery of such reports is, as an information technology matter, a very basic function. Specifying procedures for an automated two-way flow of information would be much more complicated, because it appears that Sirius XM and MRI contemplate intricate technical interactions across a wide range of parameters, which would require a high degree of interoperability between the relevant systems. Such interoperability would have to be worked out licensee-by-licensee, which would be quite resource-intensive and time-consuming. Companies sometimes work out such procedures when it makes sense, but it would not make sense to impose on SoundExchange a mandate to implement such interactions with all licensees when only Sirius XM seems interested.

B. Third-Party Programming

NAB/RMLC propose that broadcasters not be required to report usage of recordings in third-party programming. NAB/RMLC Comments, at 46-48. The Copyright Office rejected just such a proposal a decade ago, finding "no authority in the statute to create such exemptions" and

that such exemptions are not compatible with the statutorily-required reasonable notice of use. 69 Fed. Reg. at 11,521 & n.12.

In the decade since, the case for rejecting this proposal has only become stronger. While this proposal might seem from NAB/RMLC's comments to be a minor point, it appears to SoundExchange as an exception that could swallow the census reporting rule. Network and other third-party programming is a substantial part of the programming used by some broadcasters, and is becoming more so as the radio industry moves toward a model in which less and less content is locally produced.[67] NAB/RMLC's comments illustrate the point. On WDAC, syndicated programming spans about 160 hours of each week, leaving only about an hour a day of original programming. Sixty percent of this third-party programming is music. NAB/RMLC Comments, at 47. Under NAB/RMLC's proposal, WDAC would be excused from providing usage data for all, or almost all, of its music programming, and NAB/RMLC's proposal does not indicate how artists and copyright owners would be paid for WDAC's usage of their works.

NAB/RMLC's proposal also obscures an important issue in use of third-party programming. Broadcasters generally pay royalties on a per-performance basis. 37 C.F.R. § 380.12(a). Counting performances requires knowing how many sound recordings are played to

[67] E.g., Edison Research, What Nationalization Will Mean to American Radio, http://www.edisonresearch.com/what-nationalization-will-mean-to-american-radio/ (Mar. 13, 2014) (describing Clear Channel and Cumulus efforts to nationalize programming across station groups); Clear Channel CEO Bob Pittman Defends Corporate Radio at CRS, http://www.allaccess.com/net-news/archive/story/102686/clear-channel-ceo-bob-pittman-defends-corporate-ra (Feb. 22, 2012) (describing Clear Channel defense against critics who bemoan loss of local talent due to use of network programming); Clear Channel's Programming Purge, http://radioinsight.com/blog/headlines/54030/clear-channels-programming-purge/ (Oct. 26, 2011) (describing restructuring and layoffs as network programming is used on more stations).

how many listeners. *See* 37 C.F.R. § 380.11 (definition of Performance). If broadcasters "receive little, if any, information from the programming providers regarding the recordings included in that programming (either the identifying information for the recordings or when they are played)," NAB/RMLC Comments, at 46, it is not apparent how broadcasters could calculate their royalty payments accurately. The only way artists and record companies can be assured of being paid properly is if broadcasters are motivated to seek necessary reporting information from their program providers. The Judges should not at this time carve out a new reporting exception for third-party programming.

C. Small Broadcaster Waiver

NAB/RMLC propose exempting small broadcasters from reporting requirements by making the provisions of Section 380.13(g)(2) permanent and extending them to a broader set of broadcasters. NAB/RMLC Comments, at 50-52. To put this proposal in context, there are about 300 small broadcasters as defined in Section 380.11, which collectively paid about $150,000 in royalties for 2013.

While this proposal is superficially similar to the reporting waiver for NEWs discussed in Part II, small broadcasters are situated very differently from NEWs. In contrast to NEWs, small broadcasters are commercial operations with professional staff that have made a business decision to engage in webcasting. Rather than having a mission to educate their staff, small broadcasters are out to grow their audience. The Judges have recognized that such commercial services are situated differently than NEWs:

> in the commercial case, broadcasters who do not adapt in the long run will fail as commercial entities to achieve the critical mass necessary to justify their presence on the Web. Therefore, they ultimately have a strong financial incentive to become more than very low intensity users, adapt their technology, ultimately achieve

> the same capabilities as their competitors on the Web and, in the process, attain comparable capabilities for full census reporting.

74 Fed. Reg. at 52,420. To a similar effect, the Copyright Office has explained:

> It has been asserted by some services throughout this docket that for some services any reporting of information regarding performances will be too great a burden. While this assertion, if true, might result in certain services ceasing operation under the statutory licenses, it is not a valid reason to eliminate reporting altogether.

69 Fed. Reg. at 11,521.

SoundExchange agrees that if commercial broadcasters choose to make webcasting a business, they should, like other commercial webcasters, be prepared to do the things that are necessary to ensure that artists and copyright owners are properly paid when their works are used. That is why Section 380.13(g)(2) specifically provides that the reporting waiver provided therein was made available "[o]n a transitional basis for a limited time . . . with the expectation that Small Broadcasters will be required, effective January 1, 2016, to report their actual usage in compliance with then-applicable regulations." 37 C.F.R. § 380.13(g)(2). Small broadcasters have now had almost five years to figure out how to provide proper reporting for their usage of copyrighted recordings. The waiver that was specifically agreed upon as a transitional arrangement should not be made permanent or be extended to other services that have previously been required to provide proper reporting.

D. Sample Reporting

NAB/RMLC also propose that broadcasters that find census reporting too difficult should be permitted to report usage for "no more than two weeks per calendar quarter." NAB/RMLC Comments, at 52-54. In effect, they ask the Judges to reverse their 2009 decision that census reporting should be the norm for all licensees except certain minimum fee broadcasters. See 74 Fed. Reg. at 52,419-22.

While NAB/RMLC assert that such sampling is "a widely used, well-respected, and accurate means of gauging music use," NAB/RMLC Comments, at 53, SoundExchange is aware of no empirical basis to believe that such a sample is statistically accurate. Intuition suggests that such a sample would not be statistically accurate. Radio playlists vary from week to week as new recordings are released and older recordings drop out of rotation. Basing royalty distributions on reporting of usage for just two of the thirteen weeks in a quarter would overweight usage of the recordings that happen to be popular in those weeks and underweight usage of recordings that are popular in other weeks. While different broadcasters' reporting usage for different weeks might tend to mitigate those effects, that cannot be assumed.

It is true that ASCAP and BMI have used such sampling as part of their distribution methodology. However, we understand that BMI has more recently based its distributions primarily on census data obtained from a monitoring service,[68] and ASCAP's continued reliance on a two-week sample has engendered some controversy in the Copyright Office's ongoing music licensing study.[69]

In the end, NAB/RMLC provide no substantial reason for the Judges to reverse their 2009 decision that census reporting should be the norm.

E. Certification under Penalty of Perjury

NAB/RMLC propose that the Judges delete the requirement in Section 370.4 that licensees certify ROUs under penalty of perjury. NAB/RMLC Comments, at 68.

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[68] BMI Links With Monitoring Services, http://www.billboard.com/biz/articles/news/1438516/bmi-links-with-monitoring-services (May 4, 2004).

[69] E.g., Comments of Geo Music Group in Copyright Office Docket No. 2014-03, at 12, 18.

SoundExchange urges the Judges not to consider this proposal, as it goes beyond the scope of the NPRM. The NPRM simply proposed allowing ROU certifications external to the ROU. SoundExchange also asked the Judges to eliminate the requirements in 37 C.F.R. § 380.13(f)(3) and § 380.23(f)(4) that SOAs bear a handwritten signature. These proposals have gone unopposed and, as NAB/RMLC themselves recognize, would benefit broadcasters. NAB/RMLC Comments, at 68. These proposals do not open the door to this other, unrelated and more significant change, for which NAB/RMLC have not developed a factual record.

To the extent the Judges do consider NAB/RMLC's new proposal, it should be rejected. The requirement that licensees certify ROUs under penalty of perjury has existed since the Copyright Office promulgated its first notice and recordkeeping rules in 1998. 63 Fed. Reg. at 34,295. In adopting that certification, the Office specifically considered the argument NAB/RMLC makes here – that a mere statement of accuracy would be sufficient. *Id.* at 34,291. The Office concluded, however, that "[r]eports of Use must be accompanied by a statement by a Service representative, signed under penalty of perjury." *Id.* at 34,295. SoundExchange believes that this certification continues to serve an important role in communicating to licensees the gravity of reporting under a statutory license that operates on the honor system, and NAB/RMLC provide no facts to support their assertion that this requirement is all of a sudden too onerous today.

F. Confirmation of Receipt of ROUs

NAB/RMLC propose that SoundExchange be required to confirm receipt of ROUs within one business day by return email. NAB/RMLC Comments, at 90-91. While some form of acknowledgement may be practicable for some ROUs, NAB/RMLC's proposal is not as trivial as they imply. Licensees are permitted to deliver their ROUs by multiple means, including File

Transfer, email and CD-ROM. 37 C.F.R. § 370.4(e)(3). While most ROUs are delivered by email, the concept of "return email" makes no sense for other delivery means, and SoundExchange would not necessarily have a valid email address for a licensee when ROUs are delivered by other means.

Even for ROUs delivered by email, the only reason NAB/RMLC cite for their proposal is that WDAC reports having once had to resubmit an ROU assertedly provided previously, and EMF reports on "several occasions" having done the same. NAB/RMLC Comments at 90-91, Exhibit G ¶ 16, Exhibit J ¶ 9. This small inconvenience for a couple of broadcasters would not justify a new mandate in any case, and SoundExchange has recently made improvements to its ROU tracking systems that should alleviate such issues in the future.

G. ATH Reporting for Sirius XM

Sirius XM proposes eliminating the ATH reporting requirement for SDARS. Sirius XM Comments, at 6-7. SoundExchange does not question Sirius XM's assertion that its installed base of radios is unable to report back information concerning which channels subscribers are listening to. However, Sirius XM's inability to provide such information has significant consequences for the distribution of statutory royalties. When licensees report usage on an ATH basis, the reported ATH tells SoundExchange how to weight royalty allocations to each of the service's channels or stations based on listenership. Because Sirius XM's channels range from ones devoted to top hits to ones devoted to specialized genres like "'80s Hair Bands" and "Canadian Indie Music," its channels must vary enormously in listenership. However, in the absence of any listenership data, SoundExchange must distribute royalties equally among all the recordings used on each channel of the service. Thus, the play of a recording on the Canadian Indie Music channel generates the same royalty distribution as one on the Hits channel. Given

the size of Sirius XM's royalty payments, treating all channels as having equal listenership, rather than weighting royalty distributions by channel listenership as reporting of ATH data would permit, has significant economic effects.

Accordingly, SoundExchange believes that Sirius XM should be required to provide ATH data if and when it becomes feasible for Sirius XM to do so, and in its absence, that Sirius XM should be required to provide other listenership information that could be used to weight royalty allocations (*e.g.*, survey data), if available. Sirius XM's proposal came too late in this proceeding to develop a proper record concerning what data Sirius XM reasonably might be able to provide that would allow a fair distribution of its statutory royalty payments in the absence of ATH data. Thus, SoundExchange believes it would be most appropriate to address that question in discussions between the parties or, if necessary, in a separate proceeding in which the Judges could make a decision based on a fully-developed record.

Conclusion

SoundExchange appreciates the opportunity to provide these Reply Comments and urges the Judges promptly to adopt revised notice and recordkeeping regulations consistent herewith.

September 5, 2014

Respectfully submitted,

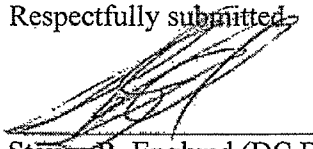

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Exhibit A
Reporting Non-Payable Tracks

As discussed in Part III.D, SoundExchange proposes the following revised language for Section 370.4(d)(2):

> *Content*. For a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service that transmits sound recordings pursuant to the statutory license set forth in section 114~~(d)(2)~~ of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(3) of this section, with the exception of incidental transmissions as described in paragraph (b)(3)(iii) of this section, whether or not the Service is paying statutory royalties for the particular sound recording:

Exhibit B
Delivery of ROUs

As discussed in Part III.E.3, if the Judges decide not to adopt that the ROU delivery proposal in the Petition, SoundExchange would propose the following revised language for Section 370.4(c):

> *Delivery*. Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the ~~forty-fifth~~day that is the same number of days after the close of each reporting period identified in paragraph (d)(3) of this section as the period for making monthly payments for the relevant type of service.

Exhibit C
Definition and Reporting of Aggregate Tuning Hours

As discussed in Part III.H.4, SoundExchange proposes the following revised language for Section 370.4(b)(1):

> *Aggregate Tuning Hours* are the total hours of programming that a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Service has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, ~~that provide audio programming consisting, in whole or in part, of eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service transmissions,~~ less the actual running time of any sound recordings for which the ~~service~~Service has obtained direct licenses apart from 17 U.S.C. 114~~(d)(2)~~ or which do not require a license under United States copyright law. For example, if a ~~nonsubscription transmission service~~Service transmitted one hour of programming to 10 simultaneous listeners, the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a ~~nonsubscription transmission service~~Service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the ~~nonsubscription transmission service~~Service's Aggregate Tuning Hours would equal 10.

As also discussed in Part III.H.4, SoundExchange suggests that the following revised language for Section 370.4(d)(2)(vii) and (viii) (as numbered in the proposed regulations included in the Petition and NPRM) could be used to refer to alternative terms adopted in rate proceedings:

> (vii) For ~~a nonsubscription transmission service~~any Service except those ~~qualifying as minimum fee broadcasters~~identified in paragraph (d)(2)(viii) or permitted to report on an alternative basis pursuant to terms in subchapter E: The actual total ~~performances~~Performances of the sound recording during the reporting period.~~;~~
>
> (viii) For a ~~preexisting satellite digital audio radio service, a new subscription service, a business establishment service or a nonsubscription service qualifying as a minimum fee broadcaster~~Preexisting Satellite Digital Audio Radio Service, a service as defined in § 383.2(h), a Business Establishment Service or a Nonsubscription Service qualifying as a Minimum Fee Broadcaster:[70] The actual total ~~performances~~Performances of the sound recording during the reporting period or, alternatively, the . . . .

[70] SoundExchange separately noted that Minimum Fee Broadcasters would more accurately be called something like "Eligible Minimum Fee Webcaster." SoundExchange Comments, at 3 n.2.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re	)	
DETERMINATION OF ROYALTY RATES AND TERMS FOR EPHEMERAL RECORDING AND DIGITAL PERFORMANCE OF SOUND RECORDINGS (*WEB IV*)	)	**DOCKET NO. 14-CRB-0001-WR (2016-2020)**

TESTIMONY OF

DORIA ROBERTS

Independent Recording Artist, Hurricane Doria Records

Witness for SoundExchange, Inc.

I. Introduction

My name is Doria Roberts. I have been an independent musician by trade and choice for nearly 22 years. I have released seven albums on my own label, Hurricane Doria Records. I offer the following testimony in response to testimony offered by the digital services in this proceeding about the opportunities that their services provide to recording artists, the investments they have made in their services, and the risks and costs they face in operating their businesses, including the public testimony from Pandora Media, Inc.'s ("Pandora's") Co-Founder and Chief Strategy Officer, Tim Westergren, iHeartMedia's ("iHeart's") President of National Programming Platforms, Tom Poleman, iHeart's CEO, Bob Pittman, and others.

Before you read my testimony, I would like to direct you to the enclosed CD. Please watch the video of me performing my music so you can see what I do. Once you've done that, I want to tell you a little about myself and the journey that brought me to my life's work as an independent musician. I then want to tell you why this proceeding is so important to me, and to millions of other independent artists like me.

A. My Story

The story of how I came to be a musician is both familiar and unconventional. It is a story of perseverance, trial and error, sacrifice, passion and—often—joy. I did not begin my life as a musician by growing up in a home full of musical instruments or sitting by my grandpa's knee while he played the piano. I became a musician at the end of my senior year at the University of Pennsylvania, after an unlikely journey of discovery.

I was the first person to attend college in my family. Like most college students, I trundled through various majors. After a few attempts to engage in esoteric subjects that did not appeal to me, I landed (or so I thought) in the business buildings on campus. I liked that business disciplines gave me a practical foundation. I thought a business-focused education

would allow me to be able to go back home as a success—a titan of industry that could lift up and support the community that supported me, maybe help another to get where I was standing.

A serendipitous talk given by a visiting world business leader set me off on another path that led me to my life's work: music. The speaker advised us to embrace and learn the culture of the people we planned to do business with. He believed that our most meaningful business education would come not in college, but in the real world. Studying another culture that I wanted to work with struck me as a radical and exciting idea. In the middle of my sophomore year, I declared a major in East Asian Studies with a concentration in Japanese Language, History and Culture. I decided I was going to be the first Black woman from Trenton, NJ USA to run a Japanese kaisha (corporation).

As I learned about Japanese culture, its aesthetic and spiritual principles moved me as much as the businessman's lecture had inspired me. My path was a study in opposites. While Sun Tzu's "The Art of War" was passed around amongst and worshipped by the more ambitious undergrads, I was learning about Shintoism, Japan's indigenous religion, that not so much dictates dogmatic instructions about how life is to be lived, but acts as a gentle but persistent reminder that there is sacred energy in every thing, inanimate or organic, and in everyone that is to be honored and cherished. In it, life was not about crushing your competitors and destroying only to rebuild in your likeness. It was instead about being mindful of the paths and the process you employ to make your way through life, to be a reflection of the world's innate and subtle beauty. Ironically, the study of the culture I wanted to work with because of its prowess, innovation and domination in certain industries prompted me to ask more profound questions about what I wanted to do in the world and, more importantly, who I wanted to *be* in the world.

It was a deceptively simple question I put to myself: What do you want to do with the rest of your life, starting now?

There a couple of facts about me you should know in order to understand how I got my answer. First, contrary to the requirements and demands of my profession, I am an introvert at heart. I grew up as an "other" in most of the communities I lived in. I was a poor black kid from the inner city going to predominately white and wealthy private schools on scholarship. I never fully embraced—or felt I was fully embraced by—either side. It was a type of spiritual segregation where I dutifully played the role of the quintessentially awkward oddball with glasses and braces, proper speech and cheap shoes. Because of this, I preferred the company of my books and drawings in my bedroom to play dates in the park. While this character trait formed a lifelong indelible love of reading and writing and while I eventually grew somewhat comfortable in my skin, it was, at the time, an incredibly isolating way to live and be.

Another thing about me: By the time I finished college, I spoke Japanese, Spanish, Korean and German fluently. Before that, I effortlessly picked up bits of Spanish and Korean in the bodegas around my neighborhood and marveled at the access it afforded me; an extra piece of candy for saying "Thank You" in the shopkeeper's native tongue or a pack of my favorite gum for teaching a new English word to his *Abuela*, who clearly missed her homeland but fully embraced her new life in America. Second language acquisition is a strange and wonderful gift I have been given and it opened me up to a life of unlimited possibility and potential beyond the streets of my childhood or the rigid four walls of higher education with its own set of challenges. My thought was that I would travel the world one day and never meet a stranger along the way—nor would I be one. For the longest time, I actually harbored a recurring fantasy about helping a

lost German tourist in Tokyo, translating between native speakers, like an ambassadorial superhero and conduit of cultures. "Doria the Decoder"

For me, music is similar. It is not just something I *play*. It is a language I *speak.* One that is universal, that breaks down the walls and preconceived notions we construct between and have of one another. I've never known anyone to argue with a song. Music was a conduit to the heart and soul of who I was and am as a person, the real me, the part of me that sometimes shied away from life and its paralyzing complexity. Music was and continues to be an instrument of self-integration, a way for me to communicate and connect not only with other people but with my own feelings, deepest desires and needs beyond the influence of society's expectations of who I should be, what I should look like, how I should sound or what shoes I should be wearing.

Playing guitar, I learned, was a meditation practice employed by the most learned spiritual masters of another philosophy called Taoism. I had no formal training on any instruments so I gravitated towards the guitar for this reason. In between classes, before work, after work: my social life suddenly revolved around my rehearsals. I learned how to play by committing to practicing at least 8 hours a day, the length of a typical work day. My mantra, echoing the sentiments of the Shinto and Taoist philosophies was to be everywhere and not get in the way or, rather, do no harm. I started playing music not because I wanted to be famous, but I knew I could make a good living at it and, equally as important, a good *life* from it.

So, I employed the same work ethic to the business aspects of my newfound career and life's work as I did in learning to play and write songs. I devoured and dogeared Donald Passman's "Everything You Need To Know About the Music Business" and it became my bible. I followed musicians I admired around like a puppy and peppered them with questions: How do

I get started? How do I learn to play better, to play faster? How do I book shows? The answer was almost unanimously, "Play live whenever and wherever you can."

I worked on honing my craft by playing open mics at local coffee shops and bars, at a busy deli counter during lunch and, when those spaces weren't available, I set up shop on the nearest street corner or in the closest park and played for whoever would listen. Many of the fans I have today discovered me because they saw me play live. I recently performed my song "Perfect" at the wedding of two fans who were on a first date during a show in Berkeley, California 11 years ago. After busking on the streets, my first real gig was in front of 500 people during an event on my campus' quad. The organizer happened to be walking by my room while I was practicing my first original song "The Love and The Pain." From there, more paying gigs followed.

When I graduated from the confines of campus into the bustling city that surrounded it, I put into practice the business leader's advice about learning your craft in the real world. There I was with rent to pay, food to buy that didn't magically appear in a cafeteria, bills that were attached to utilities that kept me warm and my apartment well lit. Out of the gate I set up a "business plan" that would allow me to pursue my passion for music. I would get a day job like waitressing that wouldn't necessarily be engaging or satisfying work, but would pay my bills and afford me the flexibility I needed to play at night or take off when I needed to if I got a show out of town. I would have roommates even though I preferred to live alone. I would save up my gig money and use it to release a record within two years. I would then wait for the major labels to come running and pounding down my door because I would also be brilliant.

I make light of it now, but it was critically important for me to prove to myself and the world that it was possible for someone like me to make real and indelible contributions to the

cultural fabric of American life. I was not a privileged kid who dabbled in folk songs as a hobby but inevitably had an alternative plan to "fall back on." I was a working class person who decided to become an artist. I had made a choice, a very radical out of left field kind of choice for me that no one in my family had made before. So I had no choice when it came to it succeeding: It had to.

So I went about my days "doing the math" to make it work. I worked more shifts, I saw less of my friends, I squirreled away what I could from my gigs, and I finally put out my first CD just under the two-year mark, exactly as I had planned. And in another three years, after I put out another CD, I heard the first rumblings of major label interest. I was, it seemed, on a clear path to success.

But, in the end, I walked away from those offers and committed myself to the art and business of being independent. *Truly* independent. I had crunched the numbers and was confident that I could do it. Performing at Lilith Fair gave me instant, national press and would be instrumental in launching my touring career. It was the perfect springboard I needed, and I left my day job the morning after the last show on stage with Sarah McLachlan, the Indigo Girls, Sheryl Crow, and some of the biggest names in music. I'd also won a free website along with my slot so I would build that as my virtual promotional tool and they would come. I knew how to produce and sell CDs, and I was no longer a novice seeking advice regarding booking and promoting my shows. With a projected 20% annual growth in revenue, which included performance income, CD sales and other merchandise, and armed with a passionate focus and drive, I would redefine success on my own terms.

Almost immediately, I set out on the road. At first, it was just a couple of days here and there. Then those days turned into weeks and, eventually, those weeks accumulated into 10

months out of the year. I played whatever venues would have me at first, then worked my way into well known spaces and theaters across the country, opening for my heroes and eventually headlining in their place and getting to travel to Canada, Australia, Sweden, France and, finally, Japan with my guitar, songbooks and CDs in tow.

When it was time to put out another CD, I did the math and crunched the numbers once again to make it happen. Finding affordable studio time; finding a way to pay for the musicians, the photographer, the graphic designer, the printing and pressing costs, the food in the studio – as a full-time artist, this became my full-time obsession.

Once I became a full-time artist, my business plan changed slightly. Now, all the money I made, which had no "supplemental" income like my waitressing jobs, went back into my business: to all the bills, touring, promotion and creating new music and merchandise. But I still had to keep my overhead low. I didn't buy or lease new cars. I had and still have my '78 Volvo that I bought for $600 in 1996. I didn't buy new shoes or clothes. I lived in a small 425 sq. ft. apartment for 12 years. ***12 years***. That's how I did it – that's how I kept creating more music and kept working at the career I loved. It's not a sob story. It's not a mystery or a marketing ploy. I am a working-class artist. There is no rich-uncle-wizard-behind-the-curtain type situation in my case. This is how it goes when you make tough decisions to be true to your life and your life's work. I have no regrets.

Things began to change in 2008. The economy crashed and hit everyone hard. I don't think people think of artists being affected in a failing economy, but we were. Gas prices were sky high as were flights, so the expenses of traveling, which I did 80% of the year, exponentially went up. Venues started paying us less because fewer people were able to come out to the

shows. Our audience was broke too. And, for the first time in all my touring history, my American dollars lost value going into Canada. It was sobering to say the least.

I had seen a slow but very deliberate decline in my music sales leading up to the economic crisis. Music sales for me were more than just supplemental income, they were nearly *half* of my income. Initially, I blamed and questioned myself. Was I not working hard enough? Was I not *good* enough anymore? What was wrong? So I temporarily stopped touring to assess the situation and come up with solutions. I found, ironically, that the only way to keep going was to not go anywhere.

Like clockwork, once or twice a week since I ceased touring full time in 2008, I get asked when I'm coming back to XYZ. And, like a broken record once or twice a week, I've had to say I can't afford it. I've had to explain time and again that not only have physical CD sales been down, but also the revenue I used to get from legal downloads has all but disappeared. Instead of getting weekly payments ranging between $200-$750 from my distributor, I started getting an average $11.36, once a ***month*** from **all streaming services *combined*.** Yes, $11.36/month is what I get from all of them. That is not a sustainable business model for a truly independent artist.

I spent my touring hiatus carefully building and maintaining a social media connection with my fan base and doing mostly one-offs in some of my bigger markets. In 2012, I decided it was time to do a full regional tour. And, while I am grateful to the people who came, I had miserable turnouts at most of the shows. In Buffalo, NY, where the temperature dropped to an unseasonable-even-for-Buffalo 30 degrees that night, I cleared $14 once the door was split with the venue. In Philadelphia, where I started my career, I lost upwards of $1,500-2,000 on *one* show because only 12 people showed up. It was the night of the Presidential debates, something I

couldn't have known when I booked the show months before. But I still had to pay the venue, their door person and sound person, pay my band, pay for their hotel room and mine for three nights so we wouldn't have to stay in more expensive NYC for our shows there. I paid for their flights (along with baggage handling fees for my cellist's cello), my low MPG rental SUV that could accommodate us and all of our equipment and luggage comfortably, highway and bridge tolls, gas and food for myself and the band (breakfast, lunch and dinner). The same pattern of financial loss repeated itself in Washington, DC, where the venue wouldn't even *allow* me to officially charge a door fee because they were showing the Vice Presidential debates in the room where I was performing following my show and where some people (my fans included) opted not to pay a door fee even as a requested donation.

B. **Why This Proceeding Matters**

This seems like an obvious statement, but it costs money to make music. It costs money to support the music you make through tours and promotion. For years, I could reliably support a CD "life cycle" sufficiently enough to allow me to record more CDs, and to perform live for my fans two to three times a year in some places. Fans would come to my shows, they and their friends would buy my CDs, and then I made another CD and went on another tour and so forth and so on. Simple stuff. Simple math. As a consequence of the decline, I play fewer shows today. I make less music than I would.

When Taylor Swift recently announced that she was removing her music from Spotify, I was surprised by the reaction accusing her of supposed "greed." I assume the people who said that were annoyed because they see Taylor Swift as an artist who is already wealthy, and they object to her taking her music off of streaming services because she views them as devaluing her music or hurting an already healthy bottom line. My point is this: What about those artists who are not wealthy? Who live CD to CD, as I did, until it didn't work any more? Are we "greedy"

if we decide that we do not like the effect that the increasing ubiquity of the streaming model has on our incomes? I challenge those people to go to work for a year and give it their all – do a good job, maybe even a great job – and then accept half a year's pay or less in return. I challenge those people to then pay their bills, keep their financial commitments, and above all to keep their enthusiasm for their job. As an artist, my love for my work is essential to doing the job in the first place.

This is my reality and the reality of the many artists who create the music that you *care* about.

This is the reality for many of the artists who create the music that the services opposing SoundExchange in this proceeding depend on for their business.

It has been suggested to me that I "get a job," and I've had to explain time and time again that not only do I have a job, in fact, I have a career and a small business. I am not only part of our arts legacy, I am part of the great American legacy of entrepreneurship. I achieved my goal of being an albeit small but integral part in that cultural fabric I spoke of earlier. According to a June 2014 article in Forbes magazine, it is small and middle market businesses that are driving growth and creating jobs (and actual *things)* in our battered economy, not large ones that seemingly appear overnight whose "innovations" are to find increasingly pathologically efficient methods to exploit the hard work and intellectual property of others. In stark contrast and in answer to this, more and more small businesses are creating sustainable business models that are both making money and saving the world, adding a more durable thread to the fabric of our collective identity and well being, not absentmindedly unraveling it for their own gain.

What if Bob Dylan, Kurt Cobain, or Diana Ross; Prince or Aretha Franklin; Steve Jobs or Ben and/or Jerry had actually *listened* when someone (undoubtedly and repeatedly) said to them "Get a job"?

What happens to the landscape of American culture? What does your personal life look like? Where is the next Bruce Springsteen, Carole King, John Coltrane or Miles Davis coming from? How do we continue to encourage and foster the very American entrepreneurial spirit of the next creator of Apple or Starbucks, which were small struggling businesses at some point that are currently synonymous with and stewards of the very American value of bootstrapping perseverance?

We don't know who we're discouraging in this climate. Not really. We don't know what chain reaction we're creating (or breaking) when we devalue artists in the equation. Take Bessie Smith for example. She is credited for singlehandedly pulling Columbia Records out of bankruptcy with the release and huge success of her recording of "Down Hearted Blues" in 1923, along with other recordings. Columbia Records then went on to become one of the most powerful and influential record companies in American history giving us great recordings from the likes of Ray Charles, Janis Joplin, Thelonius Monk, Bruce Springsteen, Willie Nelson, John Legend, Lauryn Hill, Burt Bacharach, Da Brat, Pete Seeger, Public Enemy, Simon + Garfunkel, Wynton, Branford + Ellis Marsalis, Bob + Jakob Dylan, Johnny, June Carter + Roseanne Cash et cetera and so on. I won't belabor the point, but I could cherry-pick all day from that tree brimming full to bursting with quintessential American songwriters, GRAMMY winners, relative newcomers and legends, family legacies, progenitors of their sound, innovators of their genres, artists.

So, again, how do we encourage and foster *that* spirit and that *one artist* who could make a world of difference one day? These are serious considerations to make when you consider how music plays an integral and inseparable role in our lives, from the mundane to the momentous. How it can be both ubiquitous and precious. That is something to *protect.* That's something to *respect.*

In the process of registering with SoundExchange, I learned that there is money coming to me from the use of my music on services like those at issue here. Since 2004, I understand that performances of my music on such services have yielded approximately $470. I own my own masters, so that is the total for me as both artist and copyright owner. A total of $470 from approximately 570,000 performances of my music, nearly all of which was on Pandora. In stark contrast, I was able to make twice that amount by serenading my fans on Valentine's Day with one of their favorite songs of mine called "Perfect." In one day for eight hours, my performances earned me $975—or half my rent and my entire gas bill. In one day for 8 hours I connected with my fans in a real and meaningful way, listening to their love stories and, at one point, being part of the engagement surprise for one couple. Unfortunately, I can't do that every day, but it is a real world reminder of what music can mean for fans and what it can do for artists when the transaction reflects a fair exchange.

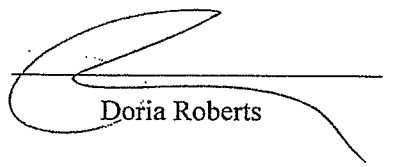
However you look at it, $470 is an obscenely paltry amount. Even combined with the $11.63 per week I get from other streaming services combined, it is simply not comparable to the money I used to earn that would allow me to create more CDs, to tour in support of those CDs, and to keep the next "life cycle" going. I believe that the ubiquity and ease of access to music like mine has made it harder (not easier) for me to persuade people to come out to my shows, to buy my CDs, to download my music on iTunes, and to support me in my career simply because

the promotional dollars and self-generating financial cushion to do so is gone. When I first started out, my mantra was to be everywhere like the Shinto spirits but not get in the way. Or, better put, to do what I needed to do to get to where I was going but to do no harm getting there. Now, in a bizarre twist on my original mantra of being everywhere and not getting in the way, I am everywhere and "no one." The digital ubiquity of my music has all but erased me in the physical world in which I work to live.

In all of these experiences and anecdotes I've presented here, I've learned a few things. But the most important thing I learned is that simple solutions sometimes require difficult choices. The simple solution is for the Pandoras and iHearts of the world to pay fair rates to the artists that make their business possible. Additionally, they need to start contributing a stronger and more sustainable thread to this fabric and the cultural landscape that has been shaken to its core and rebuild the bedrock of small businesses and independent artists that has been weakened by their current practices. Most of all, they need to educate consumers on the *realities* of their business models, not feed them the conflated notion that more consumption equals more exposure for artists when that exposure is not generating viable income for the owners of these copyrights. Going forward, they simply need to be more self-aware as powerful, trendsetting corporations and more responsible stewards of our legacy as opposed to arresting the agency, autonomy and identity of the American artist as if that had no consequence or bearing on the future. So as you deliberate this matter, and you hear all sides present their cases, ask yourself: Where is the next Bruce Springsteen, Dave Matthews, or Bessie Smith coming from? I ask you to set rates that will adequately compensate and support those artists who are working in the streets, parks and stages big and small across the country, and who are contributing their recordings that keep webcasters' businesses running.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 2/23/15



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